OHIO STATE LAW JOURNAL
Volume 48, Number 1, 1987

The Use of Lies in Negotiation*

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I. INTRODUCTION

Truth is such a precious quantity, it should be used sparingly.[1]

The humor in this quotation comes in part from the fact that it would be so easy to fill the page with condemnations of lying. The New York Public Library bears the inscription, "But above all things truth beareth away the victory."[2] Some testaments to the virtue of truth-telling are so passionate that they give the appearance of treating it as a basic value by which ethical systems themselves may be judged.[3] A nineteenth century treatise on lying opens with an apology for being so indelicate as to refer to the term at all.[4]

Sissela Bok cites St. Augustine and Immanuel Kant for their views that all lies are evil, and that lies can be tolerated only in the narrowest of circumstances.[5] Bok seems to agree. She believes truthfulness to be a foundation of all relations among human beings and that without it human institutions would collapse.[6]

The American legal community repeats these sentiments. Deception[7] can destroy a contract.[8] A defendant who touches plaintiff in an offensive manner can

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1. Colin M. Peters, paraphrasing Mark Twain. The original quotation is "Truth is the most valuable thing we have. Let us economize it." THE COMPLETE WORKS OF MARK TWAIN: PUDD'NHEAD WILSON'S CALENDAR, ch. 7 (1922).

2. The inscription is located on the northern side of the eastern facade of the New York Public Library building located at 42nd Street and Fifth Avenue, New York, New York.

3. *See generally* J. RAWLS, A THEORY OF JUSTICE (1971) on the notion of evaluating ethical principles by testing them with known solutions to specific moral problems.

4. A. OPIE, ILLUSTRATIONS OF LYING IN ALL ITS BRANCHES v-vi (1827).

5. S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 32–39 (1978).

6. *Id.* at 18–19.

7. The careful reader may note that I have used the word "deception" when "lying" might have been expected. Later in this Article, I will be careful about choosing between "lying" and "deception," the former being a specific variety of the latter. The point of this Article has to do with how these terms are used in reference to negotiation. I would like to save my comments on the distinction between lying and other forms of deception until after this opening material. My purpose here is simply to give a sense of the hostility voiced in legal writing for falsity.

8. 12 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1486, at 321–22 (3d ed. 1970). Williston cites a state court's abhorrence of a variety of deception known as fraud: "Fraud vitiates and avoids all human transactions, from the solemn judgment of a court to a private contract. It is as odious and as fatal in a court of law as in a court of equity . . . . When once shown to exist [fraud] poisons alike the contract of a citizen, the treaty of a diplomat, and the solemn judgment of the court." *Id.* at 322 (quoting *New York Life Ins. Co. v. Nashville Trust Co.*, 200 Tenn. 513, 523, 292 S.W.2d 749, 754 (1956)).

defend against plaintiff's battery claim if defendant acts with plaintiff's permission, but defendant may be deprived of the defense of consent if defendant obtained plaintiff's permission by deception.[9] False statements that damage the economic interests[10] or reputations[11] of others may result in liability to the maker of the statements. Deception in trade or commerce may expose the liar to civil and criminal liability.[12] Lying while under oath is a crime.[13] If the American Bar Association had its way, lawyers would not attempt to deceive courts as to the facts or the law.[14]

This sanctimonious applause of truth grows faint when applied to negotiation, where lawyers make a peculiar distinction. In negotiation, truth is protected only against explicit attack. That is, negotiators are forbidden to lie, but they are generally[15] encouraged to deceive in other ways.[16]

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9. W. PROSSER & W. KEETON, THE LAW OF TORTS, § 18, at 119–20 (5th ed. 1984).

10. *See* RESTATEMENT (SECOND) OF TORTS §525 (1981) (fraudulent misrepresentation).

11. *Id.* at § 558 (defamation).

12. *See* Federal Trade Commission Act, 15 U.S.C. § 45 (1982) (civil penalties for "deceptive acts or practices in or affecting commerce"); Securities Act of 1933, 15 U.S.C. §§ 77k–77l, 77q, 77x (1982) (civil liability and criminal penalties for fraud in securities transactions); Securities Exchange Act of 1934, 15 U.S.C. §§ 78r, 78t, 78ff (1982) (same); Lanham Act, 15 U.S.C. §§ 1120, 1125 (1982) (civil liability for fraud in trademark registration and use); Truth in Lending Act, 15 U.S.C. §§ 1601, 1611 (1982) (criminal liability for creditor fraud in consumer lending transactions).

13. While the point is not important enough to undertake a complete survey, it would be surprising to find any American jurisdiction that did not include perjury on the list of outlawed acts. *See, e.g.*, CAL. PENAL CODE § 118 (West Supp. 1987); ILL. ANN. STAT. ch. 38, § 32–2 (Smith-Hurd Supp. 1986); MASS. GEN. LAWS ANN. ch. 268, § 1 (Lawyer's Co-Op Supp. 1987); N.Y. PENAL LAW § 210.00 (McKinney Supp. 1987).

14. Rule 3.3(a) of the MODEL RULES OF PROFESSIONAL CONDUCT provides:

> A lawyer shall not knowingly:
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> (1) Make a false statement of material fact or law to a tribunal;
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> (2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
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> (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (1983) [hereinafter cited as MODEL RULES]. The MODEL CODE OF PROFESSIONAL RESPONSIBILITY, which the MODEL RULES replaced, also prohibited lawyers from deceiving courts:

> DR 7–102 Representing a Client Within the Bounds of the Law.
>
> (A) In his representation of a client, a lawyer shall not:
>
> . . .
>
> (4) Knowingly use perjured testimony or false evidence.
>
> (5) Knowingly make a false statement of law or fact.
>
> (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
>
> DR 7–106 Trial Conduct
>
> (B) In presenting a matter to a tribunal, a lawyer shall disclose:
>
> (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7–102(A)(4)–(6), 7–106(B)(1) (1982) [hereinafter cited as MODEL CODE].

15. Parties who stand in a fiduciary relationship have limitations on their rights to deceive each other beyond the prohibition against lying. "Where a fiduciary relationship exists between the parties, such as attorney and client, guardian and ward, trustee and *cestui que trust*, executor and legatee, principal and agent, partner and copartners, joint venturer and fellow joint venturers, there is a positive duty to disclose material facts; a failure to do so is constructively fraudulent." 12 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1499, at 390–91 (3d ed. 1970). This Article does not address these special relationships.

16. It might seem convenient at this point to include a definition of "lie." If the claims I eventually make in this Article are persuasive, then attempts to define words in this way are filled with trouble. *See infra* text accompanying notes 76–77, regarding definitions of "lying" and notes 95–96, regarding the difficulties that arise out of attempting to define words. These difficulties are treated in terms of translation from one mode of speech to another.

This Article looks at deception in the context of negotiation, primarily among lawyers.[17] It should be noted, however, that most of the examples used in this Article to illustrate various characteristics of negotiation involve direct negotiations among the parties. In such cases, the particular characteristics under scrutiny are not changed much by the absence of lawyers. I have chosen to omit lawyers from these negotiations in order to make the discussion less cumbersome.

In Part II of this Article, I try to demonstrate that literature of all kinds—children's books, popular "how-to-negotiate" books, graduate school textbooks, law review articles, professional rule-makers and court opinions—distinguish between lying and other forms of deception, favoring the latter over the former on ethical grounds. It is against the rules for lawyers to lie, but their ability to deceive through other means is at least accepted and frequently applauded in this literature. My purpose is to evaluate this distinction, a business I believe to be very complicated.

In Part III, I undertake what may seem to some a digression. Without it, this Article would show a serious inefficiency produced in negotiations by the distinction. But we would be left, I think, with a deeply felt sense that lying is wrong in ways that other deceptions are not, even if, for the sake of expedience, we decide to ignore the distinction. In other words, without Part III, the most I could hope for in this Article would be to make the reader believe that we should follow a different convention *despite* the moral or scientific basis of the current convention. With Part III, I hope to bring expedience to the level of morality and science. I argue that the conventional distinction between lying and other deceptions is a product of a misunderstanding of the nature of language. According to this misunderstanding, truth is an absolute matter. Given any statement, this view claims that the statement is either true or false, regardless of the circumstances surrounding the use of the statement. The truth of a statement is said to depend on the relationship between its meaning and the real world.

Consider the statement "I feel fine today." According to the mistaken view of language, the first chore of the truth seeker is to "clarify" the statement. The statement itself would be seen as too colloquial to be evaluated as it stands. So there would be an effort to translate it into a more "precise" language. The statement might be translated, "At the moment, I do not feel any of the symptoms that normally indicate illness." Of course, there could be many suggested translations, but they would all purport to clarify the meaning that is in the original statement. To determine

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17. Probably all the points made in this Article regarding negotiations among lawyers could describe other forms of negotiation with equal accuracy, but it is not likely that anything said in this Article accurately describes all forms of negotiation.

Focusing on negotiations where parties deal through representatives changes the dynamics somewhat from those where the parties deal with each other directly. In many ways it is harder to be generous when speaking as a representative. Lawyers speaking for clients, business leaders speaking for corporations, and elected officials speaking for constituencies can be seen as having duties to stifle urges to be generous.

On the other hand, in some ways it is less painful to be generous with another's property than it is to be generous with one's own. Ebenezer Scrooge would probably have found it easier to vote for the extension of social welfare benefits to the Crachet family than to make a contribution himself, at least before his Christmas Eve conversion. The point, then, is not that negotiators who represent others can be counted on to be more or less generous all the time. The point is that the motivating forces of the negotiator-representative are different from those of the individual negotiating directly.

what a statement means, we are directed to look at the statement itself. The context of the statement is not seen as being particularly important. Assuming the truth seeker could arrive at a satisfactory translation,[18] the translation would be compared to reality. If we agree to translate "I feel fine today," as "At the moment, I do not feel any of the symptoms that normally indicate illness," then the test for the truth of "I feel fine today," is whether the speaker "really" feels any of the symptoms that normally indicate illness.

Applying this view of language to negotiations yields the distinction between lying and other forms of deception. Suppose there has been a collision between two cars and one driver sues the other for compensation. The plaintiff might convince the defendant that plaintiff's case is strong by saying "I have more than $100,000 in medical bills," when the true figure is only $25,000. This tactic would be frowned upon as a lie. If, on the other hand, plaintiff were to increase defendant's respect for plaintiff's chances at trial by adopting a confident tone, then the tactic would be applauded as "good hard negotiating" even (or especially) if plaintiff lacked confidence in the case. The distinction seems natural if we do not question the application to negotiations of the view of language I have described as misconceived.

A better view of language is one that sees the meaning of a statement as being the use to which it is put in a particular human activity. This view of language is not original with me. But because the mistaken theory of language is so commonly held, I explain the alternative theory at some length.

According to the alternative theory, the truth of a statement depends on the degree to which the statement supports the purpose of the activity of which the statement was a part. To determine whether a statement is true, we need to know its purpose. If my preference for the alternative view is persuasive, then the distinction between lying and other forms of deception should appear less natural. That is to say, making the distinction should look like something over which we have some control. This control is nothing less than control over what is to qualify as "truth." We should feel free to decide not to make the distinction between lying and other deceptions if that strikes us as sensible. Part III is meant to show that we have that freedom.

This freedom is more basic than the freedom Bok describes when she says we can go ahead and lie if the lie is not large and is for a good purpose.[19] The freedom I refer to here is not Bok's freedom to disregard the general prohibition against lying. It is the freedom to decide what, if anything, is to be prohibited or encouraged. This decision is bound up with the idea of truth. We can decide what counts as truth in negotiation. As I argue in Part III, the freedom comes from the idea that truth is a matter of morality (a way we tell each other what to do and what not to do) not a matter of science (a way we tell each other what *is*).

In the succeeding parts of the Article, I exercise the freedom and argue that the distinction is not sensible and that we ought to do away with it and outlaw all forms of deception. The argument I make is in two unequal parts. The division is based on

18. Here I mean a translation that satisfies the truth seeker.

19. S. Bok, *supra* note 5, at 59, 75–76, 82–84.

the nature of the information being lied about. Part IV concerns lies and other deceptions about a party's preferences. If I see a 1975 Buick on a used car lot, I am motivated to conceal my special affection for that model when I negotiate with the dealer. Part IV addresses my use of lies and other deceptions aimed at concealing my preference for that model. The dealer's efforts to conceal the fact that the car has a bad clutch would fall into Part V on the ground that the information being concealed concerns something about the way the world is (that is, about the car), rather than something about the dealer's preferences. Part V also treats the obvious fact that, as a practical matter, efforts to conceal one's preferences are very closely related to efforts to conceal facts about the way the world is.

Part IV begins by looking at the purposes of negotiation and criteria for determining the degree to which any particular negotiation has achieved its purposes. It then evaluates the distinction between lying and other forms of deception given according to these criteria.

The focus is on what I call "efficiency." A negotiation is efficient if the result is one that could not be improved upon from the point of view of one of the parties without damaging the position of the other. If you and I sit down to divide a pile of money on the table, efficiency demands that we not leave money on the table. Any division of the money between us is efficient under my terminology if all the money is accounted for. This example makes the notion of inefficient settlements seem unlikely. Why on earth would we leave money on the table? Well, we would not do so on purpose. The problem is, in most negotiating situations, it is very hard to tell how much value there is to be divided. Value can take many forms, some of which are not as blatant as cash on a table.

Negotiations can be thought of as having two elements: value creation and value distribution. Value creation refers to knowing how much money there is on the table. This terminology will seem less awkward in the discussion of examples where value creation is more difficult. Value distribution refers to deciding how much of the money on the table each party is going to get.

I argue that the distinction between lying and other forms of deception cannot be justified on efficiency grounds in that they both impede both elements of negotiations. The argument as to value creation strikes me as less controversial than the argument regarding distribution. The controversy in the distribution argument arises out of an elegant paradox described by Thomas Schelling[20] suggesting that distribution is impossible without deception. If Schelling is right, then one could argue that we should suffer the problems deception causes in value creation in order to permit the ultimate distribution of that value. But, the argument would continue, we can draw the line at lying. That is, deceptive tactics other than lying could be seen as sufficient to take us out of Schelling's paradox. Accordingly, we would encourage deception generally while outlawing lying.

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20. T. SCHELLING, THE STRATEGY OF CONFLICT 22, 67 (1963) *quoted by* H. ROSS, SETTLED OUT OF COURT 159–60, nn. 17–19 (1980).

I further argue that Schelling's paradox arises only if we insist on distributing value according to the traditional used-car-salesman style of hard bargaining. I contend that if all deception (including lying) is eliminated, either by somehow outlawing it[21] or by assuring that all relevant information is known by both parties (making deception impossible), then the parties will simply adopt another method of distribution. If I am right, then neither lying nor other forms of deception can be justified in negotiation on the ground of efficiency. Although I recognize other criteria for the evaluation of negotiations,[22] my treatment of them is superficial.[23] Therefore, the persuasive possibilities of this Article depend on the reader's acceptance of the importance of efficiency as a criterion.

As noted above, Part V concerns deceptions about things other than preferences. The discussion of the distinction between lying and other forms of deception differs from the argument made in Part IV. In Part V, the efficiency criterion narrows to one concerned with information production. It has been argued that a negotiator will not spend time and money to discover important information unless there is a possibility of cashing in on it at the negotiations table.

Lying and other forms of deception are among the various ways negotiators can exploit information they alone hold. These ways can be ranked according to their relative malevolence. Physical duress would be at one end and an absolute duty to assist at the other.[24] Lying would be seen as next to, and more malevolent than, other forms of deception.

In theory, we could draw the line anywhere. The more malevolent the behavior we permit, the greater the motivation to generate information. Therefore, while it may be correct that rules allowing deception generate more information than rules forbidding deception, rules permitting lying or duress would generate more still. Yet lying and duress have few proponents, at least in the world of legal scholarship. The rule, or convention, that I suggest would forbid all deception, reducing the production of information. The magnitude of the reduction is uncertain.

Permitting deception about the way the world is entails permitting deception about preferences. A rule permitting deception in these external matters must produce enough extra information to make up for the problems of deception described in Part IV in order to justify the rule. Although I cannot prove it empirically, I think allowing deception on this ground would allow the tail to wag the dog.

If the arguments I make in the first three parts of this Article are as sensible as I think they are, then many others must have thought of them before. Appreciating my lack of originality, I am left to wonder why lawyers negotiate the way they do. In Part V, I point out specific occassions where the individual party's urge to deceive is absent or overwhelmed by other concerns. Notably, lawyers are absent, probably

21. I do not mean to suggest that outlawing deception would be easy. One difficulty is that it makes good selfish sense for one party to deceive the other. These motivations are taken up in Part IV along with the efficiency argument. In Part V, I suggest other barriers to outlawing deception.

22. *See infra* notes 102–04, 106, and accompanying text.

23. *Id.*

24. Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 583 (1982).

a necessary, though certainly an insufficient condition. Robert Axelrod's study[25] suggests that a group of reform-minded negotiators could flourish among deceiving negotiators by employing tactics of openness and veracity. I suggest that Axelrod's study does not apply to lawyers and that such a group of reformers would not fare well.

Part V concludes with sections looking at some social effects of the negotiating convention that permits deceptive tactics while forbidding lies. The most difficult of those effects to describe involves differential risk aversion. It points out that people differ in predictable ways in their willingness to accept various sorts of uncertainty. The fact that all lawyers have deception available to them as a tactic creates a specific sort of uncertainty in negotiations. It leaves the parties uncertain about whether there is any theoretical resolution of the negotiation that would be acceptable to all parties. The fact that people's particular risk-averseness varies according to the nature of the risk and the circumstances of the negotiation[26] means that, in general, those people who are more averse to risk will come away from negotiations with a smaller piece of the pie than they would have had they been less averse. This means that deception tends to shift wealth from the risk-averse to the risk-tolerant.

The other conclusions of this Article are less complicated. Deceiving without lying is a subtle business. It requires more skill than either telling the truth or lying. This added skill requirement increases the disparity in quality among negotiators. This makes it possible to increase one's share of the pie by hiring a better lawyer. Therefore, to put it too simply, the distinction between lying and other forms of deception works to the relative advantage of the wealthy.

The conventions that loosely govern negotiations among lawyers permit all deception but lying. This distinction seems natural and imperative because of a misconceived view of language. That view of language suggests that the meaning of a statement is something concrete and absolute that can be accurately stated in some special language. We often introduce these translations with the preface "literally . . . ." The truth of statements, whose meaning is now precisely put, is an absolute matter. If the statement accurately describes the real world, the statement is true.

I argue that this view of language is wrong. Meaning is a matter of use. It depends on the context of the statement. Truth is also a matter of context. It is used to encourage certain sorts of statements according to the situation. This means that truth, and therefore lying and deception, become a matter of choice, not a matter of nature. We can decide whether the negotiating convention is a good one based on how it serves us in negotiations. I argue for efficiency as a criterion and that deception in all its forms serves us poorly according to that criterion. The situation seems paradoxical. We have chosen a rule that gets in the way of our pursuit of an agreed goal—efficiency. There are two sorts of reasons for this. First, the inherent nature of

25. R. AXELROD, THE EVOLUTION OF COOPERATION (1984).

26. A person's aversion to risk also depends on various psychological factors not treated in this Article.

negotiations makes changing the rule difficult. Second, the rule seems to serve those who would be in a position to make the change.

II. Distinguishing Lying from Other Deceptions

A Bargain for Frances,[27] is a children's book about negotiation. The story concerns two children, Frances and Thelma. Frances is characterized as being trusting, naive, and virtuous.[28] Thelma is a con artist.[29] Frances goes to Thelma's house, where the two play with Thelma's plastic tea set with red flowers on it. Frances tells Thelma that she has saved $2.17 towards the purchase of a china tea set with blue flowers. Thelma convinces Frances to buy her plastic tea set with red flowers for a price of $2.17. She uses the following tactics:

1. Thelma argues that plastic tea sets are better than china tea sets even though Thelma secretly prefers china tea sets.[30]

2. Thelma tells Frances that she does not believe china tea sets are available anymore, while Thelma knows that there is one for sale in the nearby candy store for $2.07.[31]

3. When Frances expresses interest in buying Thelma's tea set, Thelma says she does not want to sell it. The reader is left with the impression that Thelma secretly did want to sell it, even as she was telling Frances the contrary.[32]

Upon returning home with the plastic tea set, Frances soon learns how Thelma has tricked her.[33] Frances sets out to return the favor, but she does not sink to Thelma's level to do so. Thelma has used lies to trick Frances. Frances decides to trick Thelma back by using other forms of deception.

At this point Frances becomes very clever. She puts a penny in the plastic sugar bowl.[34] She calls Thelma and points out to her that the "no backsies" clause in their sales agreement covers any contents as well as the set itself.[35] She suggests to Thelma that there is something in the sugar bowl.[36] Thelma concludes that what is presently in the sugar bowl was left there by her (Thelma).[37] Frances has been able to create this impression without ever actually saying anything that is untrue in the absolute,

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27. R. Hoban, A Bargain for Frances (1970).

28. *Id.* at 7–12.

29. The story begins with Frances' mother telling Frances to be careful playing with Thelma. When Frances asks why, her mother reminds her of the time Frances and Thelma played catch with a boomerang and "Thelma did all the throwing and you [Frances] came home with lumps on your head," *id.* at 8–9, and the time Thelma and Frances went to skate on the pond that had recently iced over. On that occassion, Thelma had asked Frances to try the ice first. Frances did and came home wet. *Id.* at 11.

30. *Id.* at 20–21, 36–38.

31. *Id.* at 22, 36.

32. *Id.* at 27–29. Thelma has lied about two categories of information. She has lied about the way the world is (falsely asserting the inferiority and unavailability of china tea sets) and about her own preferences (falsely denying her desire to sell her plastic set). Part IV of this Article deals with the latter and Part V with the former.

33. *Id.* at 34–38.

34. *Id.* at 40–41.

35. *Id.* at 41–42.

36. *Id.* at 42–43.

37. *Id.* at 45.

objective, scientific sense.[38] Thelma continues lying. She claims that she left a ring in the bowl.[39] Frances says it is not a ring.[40] Then Thelma lies that she left some birthday money in the bowl. Frances admits that there is money in the bowl,[41] but she does not have to tell Thelma how much.[42] She does not respond to Thelma's guesses of $2.00 and then $5.00.[43] Under the rules of no backsies, the only way Thelma can get back whatever was in the sugar bowl when she sold it to Frances is to buy the set back.[44] She no longer has Frances' $2.17, having spent $2.07 of it on the china set with blue pictures.[45] Frances agrees to take the china set plus ten cents for returning the plastic set to Thelma.[46]

The reader is left with the sense that Frances has taught Thelma a lesson while maintaining her own virtue. She has not lied to Thelma. She has simply allowed Thelma to be misled by her own greed and deviousness. It is revenge at its sweetest. The bully has punched herself in the nose. Frances does not consider either kind of trickery to be "nice,"[47] but there is an unmistakeable sense that Frances' trickery was within ethical bounds whereas Thelma's was not.[48]

Legal literature dealing with negotiation makes the same distinction. Because lawyers function in a world structured by judges and legislatures, we should not be surprised to find rules designed to govern lawyers in their negotiations, and accompanying text regarding the special difficulty of using rules to regulate negotiation. But they are general and ill-defined enough to permit a very wide range of interpretations regarding appropriate negotiating behavior. Statutes require that certain negotiations be conducted in an open and candid manner.[49] The American

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38. *See infra* notes 77–88, 97, and accompanying text regarding these kinds of language games.

39. R. HOBAN, *supra* note 27, at 45.

40. *Id.* at 45.

41. *Id.* at 45–46.

42. *Id.* at 46–47.

43. *Id.* at 46.

44. *Id.* at 46–48.

45. *Id.* at 38, 48.

46. *Id.* at 48, 50. Thelma also gets the penny that Frances put in the sugar bowl. It is not clear whether this results from the rules of no backsies or from a feeling on the part of Frances that a penny is not valuable enough to worry about.

47. *See infra* notes 190–96, and accompanying text.

48. Judi Greenberg has suggested to me an alternative interpretation of the story. Frances resorts to trickery because Thelma is such a good liar that she would catch Frances at it if Frances were to try lying herself. The story then could be read as one of mere vengence, and thus making no distinction between methods of deception.

I do not think Greenberg's alternative is plausible. Thelma may be an experienced liar, but there is no reason to think that Thelma would catch on to Frances' deception more easily if Frances were to lie rather than mislead with "literal" truth. When Frances decides to make Thelma believe that Thelma has left something valuable in the sugar bowl, R. HOGAN, *supra* note 27, at 42–43, she takes the precaution of putting a penny in the bowl before speaking with Thelma mysteriously about the contents of the bowl. *Id.* at 40–41. From the point of view of tactics, this gesture makes no sense. Frances' strategy is to make Thelma believe there is something valuable in the bowl. There is no reason to think that Thelma would have seen through Frances' mysterious talk had the bowl been empty. The penny in the bowl, then, must serve another function for the author of the story. I claim that the function is to put Frances' tactics on a higher moral plane than Thelma's tactics by relieving Frances of the charge of lying.

Moreover, even if Greenberg's alternative is plausible, I believe most readers would see it my way. If so, then the story serves as an example of the fact that we make a moral distinction between lying and other forms of deception as negotiating tactics.

49. *For example*, Truth in Lending Act, 15 U.S.C. § 1601(a) (1982) (requiring that creditors make "meaningful disclosure" in consumer credit negotiations); National Labor Relations Act, 29 U.S.C. § 158(d) (Supp. 1985) (requiring "good faith" in collective bargaining); *see* NLRB v. Generac Corp., 354 F.2d 625, 628 (7th Cir. 1965) (definition of "good faith bargaining" includes "sincerity" and "candor").

Law Institute's *Restatement of the Law* contains sanctions against dishonest negotiating,[50] but it does not specify what is to be considered "dishonest."[51] The *Model Rules of Professional Conduct*[52] prohibit lawyers from lying in negotiations.[53] Rule 4.1(a) provides that a lawyer, in the course of representing a client, cannot "[m]ake a false statement of material fact or law to a third person."[54]

Scholarly and instructional writing in the area rarely addresses the distinction directly, although it is often implicit in their writings. Although I find the idea of definitions dangerous,[55] I will offer working definitions of "lying" and "deception"

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50. RESTATEMENT (SECOND) OF TORTS § 525 (1976) (imposing liability for fraudulent misrepresentation causing pecuniary loss to persons relying on representation); *id.* comment c; *see also id.* (discussing contract sanctions).

51. RESTATEMENT (SECOND) OF CONTRACTS § 205, comment c (1979). The Restatement discusses "honesty" in terms of "good faith." *See id.* at comment a. "Good faith," according to the Restatement, means "honesty in fact in the conduct or transactions concerned." *Id.* (quoting the Uniform Commercial Code § 1–201(19)).

52. The MODEL RULES OF PROFESSIONAL CONDUCT were adopted by the American Bar Association in 1983. Adoption of the MODEL RULES was preceded by two draft proposals: a discussion draft in 1980, and a proposed final draft in 1981. The MODEL RULES replaced the MODEL CODE OF PROFESSIONAL RESPONSIBILITY. The American Bar Association adopted the MODEL CODE in 1969. *See generally* G. HAZARD & W. HODES, A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT, THE LAW OF LAWYERING at xxix-xxxi (1985) (discussing history of MODEL RULES).

Each American jurisdiction adopted a version of the MODEL CODE. Information obtained from the ABA Center for Professional Responsibility, Chicago, Illinois (March 4, 1986). To date, eleven states have adopted a version of the MODEL RULES. *Id.* These states are: Arizona, Arkansas, Delaware, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina and Washington. *Id.*

53. *See* MODEL RULES, *supra* note 52, Rule 4.1(a) and comment.

54. *Id.* Rule 4.1(a). As the Official comment to Rule 4.1 emphasizes, however, the rule refers only to statements of "material fact." *Id.* comment to rule 4.1. The comment explains the meaning of the term "material fact" as it is used in Rule 4.1(a):

> Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intention as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Id. See also G. HAZARD & W. HODES, *supra* note 52, at 426–28 (discussing Rule 4.1(a)).

Eight of the eleven states that have adopted the MODEL RULES enacted Rule 4.1(a) without change. Information obtained from the ABA Center for Professional Responsibility, Chicago, Illinois (March 4, 1986); *see supra* note 52 (listing states that have adopted MODEL RULES). The other three states (Minnesota, New Jersey, and North Carolina) adopted Rule 4.1(a) with modifications. Information from the ABA Center for Professional Responsibility, *supra.*

The MODEL CODE, *supra* note 52, did not directly address the issue of lying in negotiation. Instead, the MODEL CODE generally admonished that "[i]n his representation of a client, a lawyer shall not: . . . knowingly make a false statement of law or fact." MODEL CODE, DR 7–102(A)(5). The Discussion Draft of the MODEL RULES separately addressed lawyers in their roles as negotiators. *See* DISCUSSION DRAFT, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.2(a), 88–91 (1980). Rule 4.2(a) of the Discussion Draft provided that "[i]n conducting negotiations a lawyer shall be fair in dealing with other participants." *Id.* The official comment to the proposed rule explained that "[f]airness in negotiation implies that representations by or in behalf of one party to the other party be truthful." *Id.* at 89. The Proposed Final Draft of the MODEL RULES increased the class of persons to whom a lawyer must be truthful from negotiating opponents to include all "persons other than clients." *See* PROPOSED FINAL DRAFT, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.1, 162–65 (1981). Rule 4.1 of the Proposed Final Draft broadly provided:

> In the course of representing a client a lawyer shall not:
> (a) Knowingly make a false statement of fact or law to a third person; or
> (b) Knowingly fail to disclose a fact to a third person when:
> (1) In the circumstances failure to make the disclosure is equivalent to making a material representation . . .

Id. Rule 4.1(a)-(b)(1). The version of the MODEL RULES that was adopted by the American Bar Association retained the "third person" terminology, but limited the prohibition against false statements of fact to false statements of "material" fact. MODEL RULES, *supra* note 52, Rule 4.1(a); *see* discussion of the meaning of the term "material fact,"*supra.* In addition, the MODEL RULES eliminated the disclosure requirement of the Proposed Final Draft, except when "disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." MODEL RULES, *supra* note 52, Rule 4.1(b); *see also id.* comment to Rule 4.1 ("A lawyer . . . generally has no affirmative duty to inform an opposing party of relevant facts.").

55. *See infra* notes 79–97 and accompanying text.

here to facilitate the recognition of the distinction in writings about negotiation. A "lie" is a false statement made by one who knows its falsity and with the intent to deceive another as to the truth.[56] A "deception" is any other method of concealing the truth, including silence.[57]

Kronman analyzes the famous case of *Laidlaw v. Organ*[58] in his analysis of the law of fraud.[59] According to Kronman, the case involved Organ's sale of tobacco to Laidlaw. The War of 1812 had driven the price of tobacco down. At the time of the formation of the contract to sell, Organ knew that the war had just ended and that Laidlaw did not know. As soon as the news of the war's ending got out, the price of tobacco rose dramatically. Before entering into the contract to sell, Laidlaw had "asked if there was any news which was calculated to enhance the price or value of the article about to be purchased."[60] Kronman then distinguishes between two possible responses, each of which would have succeeded in protecting his ability to exploit his knowledge that the war had ended. Organ could have answered that he had no such knowledge—a lie, or he could have somehow cleverly avoided answering in such a way that the suspicions of Laidlaw would not have been aroused—a deception. Kronman notes that the path of clever avoidance would be sanctioned by the law, while the path of direct denial would have been disapproved of as a fraud.[61]

Wenke says,

> It is common for a party to alter a position that earlier has been represented as nonnegotiable. This practice is considered to be *bluffing* rather than *lying*.[62]

It is important to note, as Wenke does,[63] that what distinguishes puffing from lying is that the statement is not expected to be believed in what might be considered a "literal" sense. For example, the rug salesman at Bok's Eastern bazaar[64] does not lie when he says the rug is a priceless heirloom that you would be lucky to buy at the asking price. The reason is that the salesman does not expect you to believe the literal meaning of the statement. He expects that his statement will make you believe that the salesman probably is unwilling to reduce his price much. The statement would not be a lie, even if the salesman is, in fact, willing to come down dramatically. Yet the statement is meant, like all puffing, to deceive.

I think Raiffa and Sperber can be interpreted similarly. Raiffa says:

> A common ploy is to exaggerate the importance of what one is giving up and to minimize the importance of what one gets in return. Such posturing is part of the game. In most

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56. *See infra* note 77 and accompanying text for other definitions of "lying."

57. *See infra* note 79 and accompanying text for a more elaborate definition of "deception."

58. 15 U.S. (2 Wheat.) 178 (1817).

59. Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUD. 1, 9–12 (1978).

60. *Id.* at 10.

61. *Id.* Kronman notes that the path of clever avoidance might be considered fraud as well if the parties had a special relationship. *Id.* at n.27. *See supra* note 15, regarding the duty to disclose created by certain special relationships.

62. WENKE, THE ART OF NEGOTIATION FOR LAWYERS 33 (1985) (Emphasis added).

63. *Id.* at 231. "Commonly a certain amount of banter and puffing is part of the negotiating process. As an attorney's experience grows, so does his ability to understand and engage in language game-playing. Just as in everyday life, he cannot always accept statements at face value. It is understood and accepted that this sort of 'give and take' is not misrepresentation in an objectionable sense." *Id.*

64. S. BOK, *supra* note 5, at 103, 130–31.

cultures these self-serving negotiating stances are expected, as long as they are kept in decent bounds. Most people would not call this "lying," just as they would choose not to label as "lying" the exaggerations that are made in the adversarial confrontations of a courtroom. I call such exaggerations "strategic misrepresentations."[65]

Sperber says:

Most negotiators use tactics which to outsiders could be considered lying and therefore dishonest. The criteria for judging an action is not what some third party believes but what is actually meant or perceived by the parties conducting the negotiations. If the other side understands the representation is merely an exaggeration and not a representation, then it is a perfectly acceptable tactic [whose effectiveness nonetheless depends on its ability to deceive] to be utilized. If in fact the other side accepts the proposal because of its belief in what is being said, then it is a misrepresentation of a material fact, it is unethical, and the result is an unenforceable agreement.[66]

Fisher and Ury evidence their disapproval of lying by including such statements in their list of "dirty tricks."[67] Fisher and Ury use "deliberate deception" where I would use "lie." This can be seen from the language following immediately after the heading "Deliberate deception," which reads,

Perhaps the most common form of dirty trick is misrepresentation about facts, authority, or intentions . . . . The oldest form of negotiating trickery is to knowingly make some false statement: "The car was driven only 5,000 miles by a little old lady from Pasadena who never went over 35 miles per hour."[68]

Fisher and Ury list two other examples of deceptions, each of which involve lies.[69] They refer to the "dirty trick" of "announc[ing] that they [the dirty tricksters] must take it [a purported agreement] to someone else for approval,"[70] and to the "dirty trick" of falsely asserting one's intention to comply with an agreement.[71] Having disapproved of these lies, Fisher and Ury approve of other methods of deception in their approval of intentional concealment of the truth. "Good faith negotiation does not require total disclosure."[72]

Dudley addresses the problem faced by a negotiator with a weak position.[73] The simplest and most effective way to conceal that weakness would be to lie about it, claiming a strong position.[74] Instead he suggests concealing the weakness "under

65. H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 142 (1982). I would include Raiffa's "strategic misrepresentations" in my definition of "deceptions." *See infra* note 79.

66. P. SPERBER, ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS 798 (1985).

67. R. FISHER & W. URY, GETTING TO YES, NEGOTIATING AGREEMENT WITHOUT GIVING IN 134, 137–138 (1981).

68. *Id.* at 137–38.

69. *Id.* at 138–40. *See infra* notes 76–77 and accompanying text for definitions of "lying."

70. R. FISHER & W. URY, *supra* note 67, at 138.

71. *Id.* at 139. The example involves a clause in a divorce agreement that obligates the husband to pay child support. The intention of the husband to comply is claimed expressly by his lawyer. " 'My client is perfectly trustworthy. We'll put it in writing that he will pay child support regularly.'" *Id.* Fisher and Ury call the statement a "misrepresentation," *id.*, and the intention "dubious." *Id.*

72. *Id.* at 140.

73. J. DUDLEY, THINK LIKE A LAWYER, HOW TO GET WHAT YOU WANT BY USING ADVOCACY SKILLS (1980).

74. *See supra* note 48.

extra details and the affect of style . . . . This style deflects the specific inquiry as well as it aids the inflation of your meager strengths."[75]

All of this is meant to show that although the rules of negotiations among lawyers are not elaborately set out in a single governing statute, it is possible to discern conventions of a less formal nature that govern nonetheless. Among these conventions, which have something in common with rules of etiquette and good manners, is one that forbids the telling of lies while it approves the use of other deceptive tactics aimed at concealing the truth.

III. LIES

This section argues that the apparent conformance with nature of the convention that allows all deception but lying comes from a misconceived view of language. With a better view, we are free to decide whether the distinction between lying and other forms of deception is worth making and whether we ought to allow deception at all. The argument concerns language, not political science or ethics in their more traditional forms. My point is that meaning and truth are not scientific matters discovered in nature. They are the product of human decision based on the needs of the moment, and they depend on the needs of the particular situation. If we recognize that we use these notions of meaning and truth in looking at other episodes of language use, then we might as well apply the same thinking to negotiations. Rather than talking about whether any particular statement in a negotiation "is" true or not, we can talk about whether we want to consider such statements to be true based on the purposes of negotiation.

A. *Meaning*

If you were to ask people what it means to tell a lie, they would probably see the question as a fair one, a question that could be answered. You might receive such answers as "speaking falsely" or "intentionally not telling the truth." Consider a lawyerly example. Alice has driven her car into a pedestrian named Bill. He asks Alice how fast she was driving. Alice recalls looking at the speedometer just before the accident and seeing it register 80 miles per hour. She tells Bill that she was going 55 miles per hour. She does so in the hope that Bill will underestimate the value of his case against her. Under the generally held concept, Alice's statement is a classic lie. It is a lie because it has the following characteristics:

1) It is false in the sense that the statement contradicts a real-world fact. She said she was going 55 miles per hour and she was really going 80 miles per hour.[76]

2) She knew it to be false. She had looked at the speedometer at the time of the accident. At the time she was telling Bill "55 miles per hour" she believed "80 miles per hour."

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75. J. DUDLEY, *supra* note 73, at 213.

76. Assuming her speedometer was accurate.

3) She intended to deceive Bill. She wanted Bill to believe that she was only going 55 miles per hour in order to make Bill less demanding in the negotiation.

These characteristics, taken together, might be offered as the general answer to "What is a lie?"[77] In the same vein, "other forms of deception" might be defined as comprising the same characteristics as lies except that the deceiving party would not use "literal"[78] falsity.[79]

I believe attempts at definition should not be addressed in this abstract way and that such an approach betrays a misunderstanding of the nature of language. Bertrand Russell embraced this misunderstood view of language succinctly in 1922: "The essential business of language is to assert or deny facts."[80] The focus is on the relation of the statement to the real world. A statement is seen as a combination of words.[81] Each word has a meaning. The fact that many words have several meanings, even under this view of language, is seen as a practical complication that does not represent anything essential about language. It is as if the language we use happens

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77. Guernsey, *Truthfulness in Negotiations*, 17 U. RICH. L. REV. 99, 110 (1982); S. BOK, *supra* note 5, at 13–14. For examples of use of this concept of lying, see *In re* Wines, 370 S.W.2d 328, 334 (Mo. 1963), Guernsey, *supra*, at 105, and S. BOK, *supra* note 5, at 14 ("I shall define as a lie any intentionally deceptive message which is *stated*" (Emphasis original). *Id.* at 13. She notes that "It is perfectly possible to define 'lie' so that it is identical with 'deception.' This is how expressions like 'living a lie' can be interpreted. *Id.* at 14n. For the purposes of this book, however, it is best to stay with the primary distinction between deceptive *statements*—lies—and all the other forms of deception." (Emphasis original)). *See infra* Parts IV and V, for my view that for purposes of evaluating negotiations, this "primary distinction" may cause confusion.

78. *See infra* notes 83–97 and accompanying text regarding the problems surrounding the notion of "literal" meanings. The discussion there is in terms of "translation into an ideal language."

79. That is, if one party, without using "literally" false statements, creates or preserves an impression in another where that impression is 1) false, 2) known to be so, and 3) intended to conceal the truth, then the creator of the impression has successfully used "deceptive tactics other than lying."

Note that silence can be a "form of deception other than lying." Thus, I "deceive" you if I fail to tell you the car I am selling you has a bad clutch if I know it does and that you do not.

Note also that I do not intend to stand by these definitions. In the text immediately following this note, I argue that the whole business of definitions is not what it might seem to be. I offer these lame examples of how people commonly use "lie" and "deception" only as a starting point. The thrust of this Article is that we should not distinguish between the two.

80. B. Russell, *Introduction to* WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 8 (C. Ogden trans. 1983). *See also* Russell, *On the Nature of Truth* in PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 24–49 (1906–1907) (where Russell uses the term "definite descriptions"); Tarski, *The Establishment of Scientific Semantics* in A.TARSKI, *Logic, Semantics, Metamathematics* 401–08 (J.H. Woodger trans. 1983); and G. ROMANOS, QUINE AND ANALYTIC PHILOSOPHY, THE LANGUAGE OF LANGUAGE 34–40, 124–130 (1983) (describing this theory of language—under the label "the Picture Theory of meaning"--and some of its short comings).

It is immediately obvious that there are times language does nothing of the sort. "Thank you," "I assent," "Go!" and "Ouch!" do not refer to anything the way "table" does. Perhaps Russell finds such utterences non-essential, or at least uncommon. He seems to recognize the existence of other uses for language in THE BASIC WRITINGS OF BERTRAND RUSSELL 131–36 (R. Egner & L. Denonn, eds. 1961). *See* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 26–27 (G. Anscombe trans., 3d ed. 1973), where he asserts, in his questioning way, that "five" does not refer to anything in the real world in the way apple does. *See also* J. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 20, 42–50 (1969) for a discussion of the complexity of the notion of meaning in the sort of propositional statements that Russell must have had in mind.

81. B. RUSSELL, *supra* note 80; Tarski, *supra* note 80. I would include as "words" those gestures that stand in the place of orally communicated words. Thus, nodding one's head would be a "word" just as "yes" is. I would exclude gestures that are not so closely related to particular orally communicated words. For example, smiling might be seen as a sort of affirmation, but I would not equate it with "yes" or "I agree" in the way nodding can be equated with "yes." Of course, this line, like most others cannot be drawn precisely. What is shaking one's fist at another in anger? Does it stand in place of "I'm going to get you, you little creep?" Such close cases should not be troubling. Close cases do not render line-drawing ineffective as long as there are easy cases too. I think nodding is an example of an easy case.

to assign more than one meaning to certain words and that the context makes clear which of the meanings is intended in any particular statement.

Take the word "left." It has been assigned the meanings "opposite of right" and "remaining" as well as other meanings. The context of the statement "I will take the door on the left" makes it clear that the first meaning is the meaning intended. According to this view, if our predecessors had had more imagination, they would have thought up enough words to cover all the meanings, and we would not have to rely on context to sort out the appropriate meaning.[82]

In his *Tractatus*,[83] the young Wittgenstein considers what an ideal language would be like. Such a language would comprise only statements that have unique and precise meanings.[84] He compares statements in the language to parts of a picture that seeks to represent reality.[85] We can find the same concept in negotiation scholarship, with words such as "objective"[86] and "absolute."[87] I believe the concept of an ideal language and the generally held concept of lying share a common flaw. They are based on an understanding of language that focuses on the relationship of a statement to the real world. They underestimate the importance of the speaker and the listener. They fail to acknowledge the dependence of language on the context of its use.[88]

A better understanding of language sees it as one of many social activities. Better still is to think of language as a loosely defined collection of social activities. In his *Philosophical Investigations*, an older Wittgenstein quickly retreats from general statements about "language"[89] to discussions of particular "language

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82. This recourse to the context of a word's use in seeking the word's meaning is to be contrasted with the alternative view of language I embrace, *infra* notes 89–99 and accompanying text. Here the context is used only in the case of homonyms and then only to choose between a small group of discrete and prescribed meanings. It is not seen as the source of the word's meaning.

83. L. WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (D. Pears & B. McGuiness trans. 1961).

84. B. RUSSELL, *supra* note 80, at 8. Russell adds that an ideal language would not contain nonsensical statements. It seems to me that any statement that has a meaning is not nonsense, so Russell's additional requirement is unnecessary. *Id. See also* Peter Singer, "Unspeakable Acts", *The New York Review of Books*, vol. XXXIII, No. 7, April 24, 1986, at 27, for use of the term "strict philosophical sense."

85. L. WITTGENSTEIN, *supra* note 83, at 39, 67. Wittgenstein abandons this view of language in his PHILOSOPHICAL INVESTIGATIONS, *supra* note 80.

86. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, THE REC. 534–46 (Nov. 1975), *reprinted in* H. EDWARDS & J. WHITE, PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS NEGOTIATOR 406 (1977). *See* Guernsey, *supra* note 77, at 110. But note Guernsey's reference to the concept of truthfulness as being "nebulous." *Id.* at 100–01.

87. Rifkind, *supra* note 86, at 406. Rifkind also expresses some contempt for the notion that "object" or "absolute" truth is capable of definition. *Id.* at 406–07.

These terms, "absolute" and "objective," come from language that I would call "scientific" in a broad sense. Scientific language purports to describe the world as it really is. It attempts to predict the sense-data (a term MacIntyre considers to be "barbarous," A. MACINTYRE, AFTER VIRTUE 80 (1984)) others will receive under identical circumstances. For example, I might give you directions to my house by saying "A mile after the light you will come to a gas station. Turn left there and my house is on the left, number 10." The statement is a prediction that, if you drive a mile past the light you will see a gas station and if you turn left there and knock on the door at number 10, I will appear from inside.

It happens that the social institutions labeled as scientific—nuclear physicists and cell biologists, for example—seem to behave in a more complicated way. That is, they may reject a statement as false despite its predictive superiority. *See generally* T. KUHN, THE COPERNICAN REVOLUTION: PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT (1979) and D. SHAPERE, GALILEO: A PHILOSOPHICAL STUDY (1974). *See also* MARCUSE, ONE DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY 123–24 (1964).

88. For different criticism of the notion of ideal languages, see F. FERR, LANGUAGE, LOGIC, AND GOD 8–17, 42–57 (1969) and W. V. O. QUINE, WORD AND OBJECT 2–3 (1960). Quine uses the term "protocol language." For his suggestion that even analytical statements (statements like 2+2=4) depend on context for their meanings and truth, see Quine, *Necessary Truth* in W. V. O. QUINE, THE WAYS OF PARADOX AND OTHER ESSAYS 68–76 (1976).

89. L. WITTGENSTEIN, *supra* note 80 at 2–3.

games."[90] The term focuses on communication between participants within the context of a particular activity. There is no attempt to extract the communication from the activity.

To illustrate how important it is to consider a statement's particular use in a particular activity when studying that statement's meaning, look at the following very simple language-game (to use Wittgenstein's term). A is building a brick wall. She needs bricks and mortar. These are brought to her by B when she calls for them. So when A is silent, B waits by the supplies. When she says "red," B brings her a load of bricks. When she says "grey," B brings her a load of mortar.[91]

It would be possible to analyze this language game in terms of the relationship between A's utterances and the real world. We could say that "red" corresponds to reddish rectangular objects piled near B, and we could say that "grey" corresponds to the wet grey material in the tub. Suppose Observer has listened to A call out "red" and "grey" and has seen B respond by bringing the appropriate building materials to A. Following the correspondence-theory[92] analysis, Observer might describe to Listener the language used by A and B by saying "The language has two words, 'red' and 'grey'. The first means 'bricks' and the second means 'mortar'."

If Listener is familiar with the terms "bricks" and "mortar" through their use in a wall-building process similar to that of A and B, then the description is satisfactory. Otherwise Listener will have no more than the barest beginnings of an understanding

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90. *Id.* at 5. Wittgenstein describes the relationship among language games. "[S]omeone might object against me: 'You take the easy way out! You talk about all sorts of language-games, but have nowhere said what the essence of a language-game, and hence language, is, what is common to all these activities, and what makes them into language or parts of language. So you let yourself off the very part of the investigation that once gave you the greatest headache [der dir selbst seinerzeit das meiste Kopfzerbrechen gemacht hat], the part about the general form of propositions and of language.'

"And this is true—Instead of producing something common to all that we call language, I am saying that these phenomena have no one thing in common that makes us use the same word for all [es ist diesen Erscheinungen garnicht Eines gemeinsam, weswegen wir für alle das gleiche Wort verwenden],—but that they are related to one another in many different ways. And it is because of this relationship, or relationships, that we call them all 'language'."(Emphasis ommitted. I have slightly altered Anscombe's translation at the points noted by the insertion of the original German.) *Id.* at 31.

91. This is a variation of a language-game described by Wittgenstein in PHILOSOPHICAL INVESTIGATIONS, *supra* note 80, at 3. Wittgenstein uses his game as an example of a language-game in which the relation of the statements made to the real world is important. He proceeds to more complicated games in order to demonstrate that, in the other games, the relationship is not important. *Id.* at 5–6. I think that Wittgenstein would have agreed with me that the relationship is not important in the simple language-game either. It may be that, as a matter of writing strategy he felt that the lack of importance would be easier for his readers to see in the more complicated language-games. Whether or not Wittgenstein would agree with my use of his language-game is an exercise in history that is unrelated to my argument. I do not cite him for support. I mean only to give him credit.

92. Putnam describes the historical significance of this theory of language as follows:

> Before Kant almost every philosopher subscribed to the view that truth is some kind of correspondence between ideas and 'what is the case'. However puzzling the *nature* of the 'correspondence' may be, the naturalness of the idea is undeniable. There is a world out there; and what we say or think is 'true' when it *gets it the way it is* and 'false' when it doesn't correspond to *the way it is*. [Emphasis original]

H. PUTNAM, MEANING AND THE MORAL SCIENCES 1 (1978). Duncan Kennedy describes views denying the need for a corresponding reality as "psychotic." Personal Conversation with Duncan Kennedy (1984). Popper finds them "vicious." K. POPPER, QUANTUM THEORY AND THE SCHISM IN PHYSICS 42 (1982). For Popper's more expansive support of correspondence theory, see *id.* at 3, 30, 41–46, 102–03 and 173, and K. POPPER, CONJECTURES AND REFUTATION: THE GROWTH OF SCIENTIFIC KNOWLEDGE ch. 10 (1962), and K. POPPER, OBJECTIVE KNOWLEDGE ch. 2 (1972).

See also L. WITTGENSTEIN, *supra* note 83, at 39–43, 67 and 99; and H. PUTNAM, MIND, LANGUAGE AND REALITY 70–84 (1984). Putnam defends the correspondence theory in the face of Wittgenstein's later writings in H. PUTNAM, MEANING AND THE MORAL SCIENCES 97–100.

of the language used by A and B. If Listener were to attempt to take B's place in the building operation armed with only this understanding of the language, he would not perform well. A would call out "red" and Listener would imagine that A meant to refer to the bricks. Listener would not realize that A would expect him to do something with the bricks. Listener's inaction could lead A to believe that Listener did not understand what "red" means. A might explain that "red" does not simply refer to the pile of bricks. It means that Listener should bring precisely one load of bricks to A. The language is not just a pair of labels for bricks and mortar. It is part of a wall-building activity.[93] "Red" and "grey" depend on their use in this activity for their meaning.[94] This dependence makes translation into some ideal language of the sort sought by Russell and the early Wittgenstein impossible. The translation would have to include a complete description of the activity.[95]

Furthermore, the ideal language would be used in some other activity. No language can be used free of any context. Words (or signs of some sort) pass from

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93. *See* H. PUTNAM, MEANING AND THE MORAL SCIENCES 100-03.

94. This theory of meaning remains controversial. "The angry schoolmaster, to use one of Gilbert Ryle's examples, may vent his feelings by shouting at the small boy who has just made an arithmetical mistake, 'Seven times seven equals forty-nine!' But the use of this sentence to express feelings or attitudes has nothing whatsoever to do with its meaning." A. MACINTYRE, *supra* note 87, at 13.

Goffman would push the importance of context further. Beyond claiming that the meaning of a statement is identical to its use in an activity, he argues that the identity of the speaker consists of no more than the speaker's role in that activity. E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 253–54 (1973). Goffman's extension of the importance of context is unnecessary to my argument here.

95. The United Nations provides simultaneous translations of speeches for visitors into several languages. Visitors put on headphones and can set a dial to listen to any of a number of translations. A French diplomat addressing the General Assembly might say "livre." English speakers would hear the translation: "book." Spaniards would hear "libro," and Germans would hear "buch." If the listeners understand, it is because they are familiar with uses of the words they hear that are the same as the uses of "livre" in French.

Problems in translation arise when this familiarity is reduced. Earlier this year four men hijacked an Italian cruise ship, killing an American hostage. The men were captured and held in Italy. An American official commented on the possiblity that the men would be brought before an American court, saying, "the real question here is whether we put a full court press on Italy to extradite them." (Taylor, *Italy More Likely Than U.S. to Try Suspects in Hijacking of Cruise Vessel*, New York Times, October 12, 1986 at 5.)

A number of populations speaking a number of languages might have been interested in the American official's comment. Consider the task of translating the statement into Italian and Arabic. Problems would arise with the term "full court press." The term is used in playing basketball. Although the game originated in the United States, it is quite popular in Italy and the Italian translator could be expected to have an Italian equivalent. But what of the Arabic translator. Even if the game is played by some speakers of Arabic, the game is probably not well enough known among the Arabs interested in the fate of the hijackers to expect that the Arab translator would share the Italian translator's good fortune. Most likely, the Arab translator would have translated the words "full," "court" and "press" before, but those translations could not be used here.

If the term had been used by an American basketball coach to describe strategy for a game, the Arabic translation would have to contain an explanation of the game of basketball, that being the activity to which the term would belong. But the term was used in connection with American diplomatic relations with Italy. The activity in which the term "full court press" was used has to do with politics. To have any hope of understanding what the American official meant by the term, one must have some familiarity with that activity. If the official was original in this use of the term, then only those familiar with both international relations and basketball would understand. If the term has been used enough before in discussions of international politics, then familiarity with basketball becomes unnecessary. Translators might report the American's statement as if it had been "The real question is whether the we will exert as much pressure as we can on Italy to extradite them."

To know what "full court press" means, we have to know something about the activity in which it is used. If it is used in connection with a basketball game it means one team is trying to steal the ball before the other team can cross the midcourt line. As used by the American official, it means something like "full-scale diplomatic pressure." The meaning of a statement can be thought of as being the use to which it is put in a particular activity.

For another expression of skepticism regarding the possibility of reducing "everyday" speech to a clearer and more precise language, see A. MACINTYRE, *supra* note 87, at 101.

one person to another[96] each of whom exists in some particular time and place. The language that they use depends on that context for its meaning. There is nothing about any particular language, meaning its collection of words and grammatical rules, that make it "better" than any other language in an absolute sense.[97] The quality of a language depends on how well the language works in achieving the ends of some set of human activities.

B. *Truth*

Moreover, judging the quality of a language, or a particular portion of a language, need not be an exercise in pure theory. We can decide that a particular sort of statement is helpful and then encourage its use. This is not so strange as it might seem at first. We routinely use "truth" in this way. In other words, we characterize as "true" statements we wish to encourage.[98] Consider the following pair:

1. The apartment where you live has blue wallpaper.

2. "The apartment where you live has blue wallpaper," is true.

The first statement is a statement about your apartment. It attributes to it a particular characteristic—namely, blueness. We could imagine situations, or language-games, where such a statement would be useful. For example, you and I might be shopping for a new print to decorate the walls of your home and I might make the statement about your wallpaper in order to help us focus our search on prints that would look good against a blue background. We could also imagine situations where the statement would not be useful. If you and I were discussing the merits of a proposal before Congress to limit the importation of shoes into the United States, then my statement, "The apartment where you live has blue wallpaper," would be useless.

The second statement is a statment about the first statement. It attributes a particular characteristic to the first statement—namely, truth. As was the case with the first statement, we could imagine situations where the second statement would be useful and others where it would not. Its usefulness would depend on the purpose of the language-game being played. It would depend on the point of view from which our analysis proceeds.

Consider the following example of how the two statements might be used: We are again shopping for a print to hang on the wall of your apartment and we pause in front of a print of an abstract painting that features a solid blue canvass.

You: This is a nice print. How do you like it?

I: I like it very much, but I don't think it is what we are looking for. The apartment where you live has blue wallpaper, isn't that true?

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96. There has been controversy regarding the possibility of private language, that is, language involving only one person. *See, e.g.*, Ayer, *Can There Be a Private Language?*, Rhees, *Can There Be a Private Language*, and Cook, *Wittgenstein on Privacy* in G. PITCHER, WITTGENSTEIN: THE PHILOSOPHICAL INVESTIGATIONS 251–266, 267–285, 286–323 (1966).

97. Gadamer questions the validity of favoring scientific truths over other kinds of truth in H.–G. GADAMER, TRUTH AND METHOD xi, xii, 5–10 (1975). *See also* K. HÜMMER, CRITIQUE OF SCIENTIFIC REASON (P. Dixon and H. Dixon trans. 1983).

98. Who "we" is here is hard to say. *See infra* text accompanying notes 179–84.

Suppose you had recently removed the paper from the walls of your apartment because it had begun to peel and that you replaced it with a fabric that is applied with a complicated procedure that creates an interesting texture and then painted the walls the same color blue. What should you say in response to my question about the truth of my assertion that your apartment has blue wallpaper? If you say "No," then the conversation would continue like this:

I: What color is it now?
You: Oh, its the same color as before.
I: Then why didn't you say so before.
You: Well, I've taken down the wallpaper and replaced it with this stuff that's not really paper but it's too complicated to explain now.
I: So what?
You: Well you asked whether your statement was true, and it wasn't. So I said "No."

I would then mutter something about your pedanticism and we would move on to the next print.

I think that you should have simply answered "Yes," in the first instance. The statement is true because it is the color of your walls that is relevant to our activity of looking for a suitable print. The distinction between traditional wallpaper and the fancy stuff you have chosen to put up is of no consequence in this context. For the purpose of deciding whether the blue print is appropriate, you do have blue wallpaper. The distinction might be relevant in other contexts, but it is not here.

It might also be the case that an artist friend of yours has pointed out to you that the color of your walls is, technically speaking, not really blue, but a mixture of blue and green. You may have been told by an architect that your dwelling place is really a townhouse, not an apartment. Your psychiatrist may have told you that what you are doing in your apartment is not really living. But none of these distinctions are relevant in the print-choosing context. The fact that these distinctions can be made in other contexts should not compel you to deny the truth of my original assertion (that the apartment where you live has blue wallpaper).

Let me be more explicit about how I reach this conclusion. I begin with my intention to evaluate alternative ways of talking as we try to find a print for your apartment. The evaluation depends first on a determination of the purpose of the activity. How do we tell whether the print-choosing language has worked well? I have assumed a sort of efficiency criterion. The print-choosing is more successful as we find better prints with less time and trouble. The language used in that activity is "better" as it contributes to these ends. Because the concerns of the artist, the architect and the psychiatrist discussed above are irrelevant to the print-choosing process, the language of print-choosing should ignore the distinctions that these people would make.

We would discourage each other from making these distinctions through a selective use of "truth." We considered the statement, "The apartment you live in has blue wallpaper." The statement is helpful to the task of finding a print, so we

would say that it is true.[99] In other contexts, such as those involving artists, architects, or psychiatrists, we would say that the statement is not true.

The next section of this Article follows the same procedure in evaluating alternative ways negotiation, a category of language (or a group of language-games), can be played. I have argued that commentary on negotiations discourages lying by labeling such statements as false while encouraging other forms of deception if they can be interpreted as "literally" true. The first task is to determine what criteria should be used to evaluate negotiations. Then the distinction between lying and other forms of deception can be evaluated.

IV. Evaluating Negotiation Sessions

In this section of the Article, I wish to evaluate a language that is used in negotiation. In particular, I wish to consider a convention. By "convention" I mean to include more than statutes and other explicit rules. Conventions can evolve without anyone passing on them in an official way and without anyone attempting to state them explicitly. Yet these conventions have normative force. My use of the term here has something in common with "manners" and "etiquette." Rather than being enforced by the power of the state to reward or punish, these conventions depend on peer pressure and perhaps even the actors' ability to feel guilt. The convention I wish to address disapproves of lies, like the ones told by Thelma,[100] and permits other forms of deception, like those used by Frances.[101]

In this part of the Article, I argue that the distinction makes no sense because lying and other forms of deception affect negotiations in the same way. The preceding parts of this Article are intended to show that this argument depends on what we consider to be important in negotiation sessions. The argument depends on what it is that allows us to say that one negotiation session was better than another.

In Part III of this Article, I discussed an encounter between two people decorating an apartment. That encounter involved communication between the people and is an example of what I, without originality, have been calling a language-game. The game could be said to have had at least one purpose, to select a good print for the apartment. We could imagine other purposes—killing time or getting to know each other, for example. Each purpose provides a criterion according to which various statements can be evaluated. Taking the selection of a good print and the conservation of time and effort as the criteria, we found that the game would be better played by considering the statement "Your apartment has blue wallpaper" to be true.

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99. This sense of "truth" strikes me as consistent with Rorty's. He says, "My point in suggesting that there are two senses of 'good' is, of course, to make plausible the suggestion that there are also two senses apiece of 'true' and 'real' and 'correct representation of reality', and that most of the perplexities of epistemology come from vacillation between them (just as most perplexities of meta-ethics come from vacillating between senses of 'good'). To begin pursuing the analogy between goodness and truth, consider the homely use of 'true' to mean roughly 'what you can defend against all comers.' Here the line between a belief's being justified and its being true is very thin. That is why Socrates had trouble explaining the difference between these two notions to his interlocutors, the same trouble we philosophy professors still have in explaining it to our freshmen." R. Rorty, Philosophy and the Mirror of Nature 308 (1979).

100. *See supra* notes 30–32 and accompanying text.

101. *See supra* notes 34–46 and accompanying text.

Negotiations are also language-games. We can inquire into their purposes and generate various criteria for the evaluation of statements made in the negotiations. The number of possible criteria for evaluating negotiations is theoretically without limit. We could look at the efficiency of the result. We might consider the effect of the negotiation on the relationship of the participants and their relationship with society generally.[102] We could ignore the results and consider the process of the negotiation in isolation.[103] We could even consider whether the negotiators enjoyed the negotiation.[104]

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102. *See generally* R. FISHER & W. URY, *supra* note 67, at 4, 20–21.

103. *See, e.g.*, J. RAWLS, *supra* note 3. Rawls puts himself to the task of generating just rules to govern society. Rather than suggest particular rules, he describes a process that would yield fair rules. "The aim is to use the notion of pure procedural justice as a basis of theory. Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations." *Id.* at 136–37.

I find Rawls' approach unattractive. There are many results that I would describe as unjust regardless of the process that leads to them, slavery being an example. Rawls claims that this could not happen. He argues that no rational person located behind the veil of ignorance would agree to such a system. "[T]he sensible thing for him [the rational person behind the veil] to do is to acknowledge as the first principle of justice one requiring an equal distribution [of goods]. Indeed, this principle is so obvious that we would expect it to occur to anyone immediately." *Id.* at 150–51. The reason cannot be concern for the slaves, whoever they may turn out to be, because Rawls has banished altruism from his system. "The assumption of mutually disinterested rationality, then comes to this: the persons in the original position try to acknowledge principles which advance their system of ends as far as possible. They do this by attempting to win for themselves the highest index of primary social goods, ... The parties do not seek to confer benefits or to impose injuries on one another, they are not moved by affection or rancor. Nor do they try to gain relative to each other; they are not envious or vain. Put in terms of a game, we might say: they strive for as high an absolute score as possible." *Id.* at 144. The reason a person behind the veil would not agree to principles that would permit slavery, then, presumably is that the person would run the risk of turning out to be a slave rather than a master. In a related context, Rawls states, "[I]t seems that the parties would prefer to secure their liberties straightway rather than have them depend upon what may be uncertain and speculative actuarial calculations." *Id.* at 160–61.

I do not think Rawls is justified in including caution in his definition of rationality. Suppose the person behind the veil is considering two sets of principles, one that would make slaves of 10% of the population, leaving their exploitation to the rest. The other set of principles would make such disparities impossible. Given Rawls' assumption of selfishness ("mutually disinterested rationality"), I think the standard rational person (*See id.* at 143, n.14) might be so attracted to the prospect of exploiting slaves for his or her own gain that he or she would be willing to endure the one chance in ten that the person would end up a slave. My choice of percentages (10% and 90%) and of the level of deprivation for the losers (slavery) are arbitrary. I could have made the chances of being deprived infinitesimally small and the deprivation minor without changing the unacceptability of such risk-taking under Rawls' argument. Regarding my view that risk taking is common enough to be considered rational, *see infra* notes 207–11 and accompanying text. Thus, I think that Rawls has set up his procedure, that is, his rules of rationality, knowledge and motivations, with an eye towards the result. Rawls has not invented a procedure using independent criteria. He judges the procedure by the results it will generate. The unfairness of slavery, even under Rawls, has to do with slavery itself, not the procedure that might lead to it. Rawls himself suggests this with his notion of "reflective equilibrium." *Id.* at 20.

Furthermore, I see no contradiction in saying that an unfair process yielded a just result. We might decide to allocate beverages according to people's ability to memorize names in the telephone book. I would call this process unjust in that, among other things, the ability to memorize lists seems so unrelated to thirst. If, however, it happened that the people who memorize well are the ones that are thirsty, then I would say that the unjust distribution system happened, this time, to produce a just result. For another criticism of Rawls's theory, see R. WOLFF, UNDERSTANDING RAWLS, A RECONSTRUCTION AND CRITIQUE OF *A Theory of Justice* 66–70 (1977).

104. Bok argues that lying in an Eastern bazaar and bluffing in poker games can be justified on the ground that the participants know what they are getting into when they decide to participate. As long as the decision is freely made, Bok finds the deception to be justified. S. BOK, *supra* note 5, at 83, 88, 103–04, 130–32.

Her analysis stops short of considering the extent to which various forms of deception should be encouraged in these contexts. In other words, she does not explicitly ask what value deception contributes to bazaars and poker games. The contribution seems to be the pleasure of the negotiators. She finds the fact that the stakes are not high to be important to her conclusion that deception is justifiable in these situations. She notes that certain deceptions are "more excusable the more trivial their effect on others," *id.* at 104, and that the "harmlessness" of the deception enhances its excusability,

I will focus exclusively on efficiency as the criterion for the evaluation of negotiations. I do so for two reasons. First, everyone else does.[105] If I am to look at a distinction that is made in reference to negotiations, then it makes sense to do so in terms used by people making the distinction. There is no magic in arguing to the beast of burden that the distinction between green cargo and blue cargo makes no sense. The beast cares only about how heavy the load is, not the load's color. Given that the distinction between lying and other forms of deception is made in a discussion of the efficient creation and allocation of value in negotiations, we might expect that the distinction would lose its allure if we deny the goal the distinction was meant to serve. My second reason for focusing on efficiency is that I agree with the authors cited immediately above that efficiency is and ought to be a goal of negotiations.

I use the term "efficiency" in the traditional micro-economic sense. It is closely related to the concept of optimality. Two people are fighting over an orange. One wants to drink the juice, the other wants to use the peel to bake a cake. A resolution that gives each person half of the orange is inefficient because it would be better to give one person all the juice and the other person the entire peel.[106] The second result would be better because both people would prefer it. Both are made

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id. at 78–79. She finds that the purpose of the bazaar or the poker game is for the participants to "try to outwit one another." *Id.* at 104. In such cases, deception is vital to the activity. Taking deception out of the bazaar and poker games would be like taking fisticuffs out of a boxing match. *Id.* At first I am tempted to reject this category without argument. If the purpose of a poker game or a trip to the bazaar is to enjoy the pleasure of mutual attempts to deceive, then most would agree that deception is valuable to language games encountered at bazaars and poker tables. If the purpose of a poker game or a trip to a bazaar is to reallocate important resources, large amounts of money, for example, then I would have expected widespread agreement that the pleasure of deception pales into insignificance before more important categories such as efficiency.

But I do not think the pleasures of deception can be so easily dismissed. Lawyers spend their lives negotiating. Their negotiations involve deception. It is a popular occupation. Although pollsters delight in showing the disrespect of the public for lawyers, and there is no reason to think that this disrespect is not genuine, attorneys remain a proud elite with plenty of status. Tens of thousands of college graduates apply to American law schools every year. It is hard to imagine that the status enjoyed by lawyers, and the pleasure they derive from the practice of law, are not, at least in part, due to the way they negotiate. It is possible that lawyers enjoy negotiating in the same way that tourists enjoy the Eastern bazaar. Commentary on negotiating styles reflects this. Williams' survey of 2,000 practicing attorneys from Denver and Phoenix and his more detailed observation of 45 of them, G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 15–16, 137–39 (1983), led him to conclude that a substantial portion, 24% in his study, could be characterized as "competitive" in their negotiating styles. *Id.* at 18–19. That is, "they appear to take a gamesmanship approach to negotiation, having a principle objective of outdoing or outmaneuvering their opponent. [sic] . . . [T]hey want to outdo the other side; to score a clear victory." *Id.* at 24. Fisher and Ury make similar, though less quantified, observations. R. FISHER & W. URY, *supra* note 67, at 8–9.

If this is so, then my cavalier dismissal of pleasure as a category for the evaluation of negotiations becomes a self-righteous plea. The high cost of legal services implies that the matters handled by lawyers are important to their clients. The rules governing negotiation ought to address the welfare of that clientele and society generally. The fun lawyers have negotiating should be secondary. Given my conclusion that this category is not valid, the question of whether the distinction between express lies and other forms of deception contributes to the pleasure of negotiators becomes moot.

105. R. FISHER & W. URY, *supra* note 67, at 4–6; H. RAIFFA, *supra* note 65, at 133–47; L. BACOW & M. WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 33–34 (1984).

106. Bazerman, *Negotiator Judgment: A Critical Look at the Rationality Assumption*, 27 AM. BEHAV. SCI. 211, 215–16 (1983), *citing* Follett, *Constructive Conflict*, in H. METCALF & L. URWICK (eds.), DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT (1940).

better off.[107] I mean to confine the discussion to the interests of the parties to the negotiation.[108]

The orange-splitting resolution discussed above is immediately inefficient because the alternative solution would make the people involved happier. Thus there is a social or group character to my use of the term, but it is limited to the parties to the negotiation. Whether some other allocation of the orange would have made society at large better off is a matter outside my discussion.[109]

The idea that negotiations succeed in achieving this sort of efficiency is deeply rooted in the theory of capitalism. The basis of the division of labor is an exchange of services between individuals. For example, imagine a modification of the wall-building activity.[110] A and B are wall-builders. A is hired to build wall A, and B is hired to build wall B. They each have a pile of bricks and a quantity of mortar. Each transports the materials to his and her respective work site and each lays the bricks to construct his and her respective wall. Suddenly A has a flashing insight. She realizes that the walls would be built more quickly if one of them were to do all the transporting of materials and the other were to do all the laying of bricks. Market theory holds that A and B will adopt A's more efficient production technique, dividing the profits between them on a basis acceptable to both. Both will earn more than they could have working separately (assuming that the task of laying bricks is not exactly onerous as that of transporting the supplies). The economy has become more efficient in that the labor cost (in hours) of wall-building has declined. Thus, A and B have inadvertently contributed to the general economy while pursuing their own individual selfish ends.

For this advance in labor utilization to have taken place, A and B had to agree to join forces and change their wall-building technique. They had to decide who would lay the bricks, who would transport the materials, and how the profits would be divided. These decisions are understood to be made by some sort of negotiation (assuming the decisions were voluntarily accepted by both A and B). If the negotiations were poorly structured or poorly carried on by A and B, they might have failed to agree.

Scholars have found all negotiations to have two elements. I will call them

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107. *See* R. FISHER & W. URY, *supra* note 67, at 5.

108. In fact, my discussion of efficiency ignores at least two factors that might be considered part of a broader sense of efficiency—the cost of the negotiation process itself and the effect of the negotiation on the long term relationship of the parties. I omit discussion of the first two factors because they strike me as uncontroversial (and therefore dull) from the point of view of lying and other deceptive tactics.

I do not see what effect lying and other deceptions could have on the cost of the negotiation process itself other than to speculate that use of such tactics prolong the process. The argument would be that the negotiation process involves the piecemeal communication of each party's knowledge and position, a process that would be faster if each party could count on the truthfulness of the other party.

Similarly, it seems to me that an argument could be made to the effect that deceptive tactics of all kinds would have the tendency of creating distrust between the parties. Like the argument regarding cost, this argument has an intuitive appeal to me, but I will not treat it in this Article.

109. We could imagine, for example, that there is a glut of orange cake and that, if this orange peel finds its way into a cake, the market for orange cakes will crash and the society will be ruined.

110. It is described in the text accompanying *supra* note 91.

"zero-sum" and "non-zero-sum" elements.[111] Discussions concerned with who gets what slice of the pie are zero-sum discussions. Those concerned with making the pie bigger are non-zero-sum discussions. An example may help. Abel has proposed Abel's Package as a resolution to her negotiation with Baker, and Baker counters with Baker's Package. Assume Baker's Package is better for Baker than is Abel's Package.[112] If Baker's Package is also better for Abel, then Abel and Baker are having a non-zero-sum discussion. If, however, Baker's Package is worse for Abel than Abel's Package, then they are engaged in a zero-sum discussion.

The term "zero-sum" arises from a utilitarian model in which we can somehow find a method of comparing Abel's feelings about the two packages with Baker's feelings. We might say that Abel would get 10 "utils" (units of utility or satisfaction or happiness) from Abel's Package and 5 utils from Baker's Package. Let us say that B would get 2 utils from Abel's Package and 7 utils from Baker's Package.

	Package	
	Able's	*Baker's*
Able's Utils	10	5
Baker's Utils	2	7

The total utility associated with Abel's Package, then, is 12 (Abel's 10 utils plus Baker's 2 utils). The total utility associated with Baker's Package is also 12 utils (Abel's 5 utils plus Baker's 7 utils). The net change in total utility in replacing Abel's Package with Baker's Package then is zero. Abel lost 5 utils and Baker gained 5, for a sum of zero.

We could easily imagine a third category, in addition to zero-sum and non-zero-sum, as defined in this Article. This category would be broken out of the zero-sum category, which covers those situations where replacing one outcome with another helps one party while hurting the other. We could imagine discussions about an alternative outcome where the first party would be made worse off by less than the second party would be made better off. Using the above example, Abel might have preferred her proposal, Abel's Package, but by only one util. Thus replacing Abel's Package with Baker's Package would increase the total utility of Abel and Baker by 4 utils (the replacement costs Abel one util, while gaining Baker 5).

I feel this category to be unnecessary for two reasons. First, it is not at all clear that there is any way to compare the feelings of one person to another with any precision.[113] Second, for most of the negotiations involving lawyers, there are trades

111. There is a variety of terminology used for this point. Also using "zero-sum" and "non-zero-sum" are L. BACOW & M. WHEELER, *supra* note 105, at 33–34; R. HAYDOCK, NEGOTIATION PRACTICE 9–11 (1984); O. BARTOS, PROCESS AND OUTCOME OF NEGOTIATIONS (1974); and Nash, *The Bargaining Problem*, 18 ECONOMETRICA 155–62 (1950). H. RAIFFA, *supra* note 65, at 33, uses "distributive and integrative," as does Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281–306 (1956).

112. Baker might propose an alternative to Abel's Package that is worse for Baker himself. He might do so out of irrationality, *see* Bazerman, *supra* note 106, at 211, or as a tactic to disguise his own interests. *See infra* note 155 and accompanying text.

113. There are even theoretical problems associated with comparing one person's feelings for two different things. Not everyone would agree that there is a basis for my statment that I enjoy eating potato chips while listening to the radio

that can be made which quickly convert discussions of this third type into discussions of the non-zero-sum category. Let us return to Abel and Baker. When we left them, they had the following feelings about the two packages:

	Package	
	Able's	*Baker's*
Able's Utils	10	9
Baker's Utils	2	7

If Abel and Baker are restricted to these packages, then we would expect Abel to resist Baker's proposal of Baker's Package. If, however, we relax this restriction, Baker will very likely be able to find a way to pay Abel to accept Baker's Package. The payment could be a sum of money. Let us say that the payment is worth two utils to each person. Then we would have the following table of preferences:

	Package	
	Able's	*Baker's**
Able's Utils	10	11
Baker's Utils	2	5

*Including Baker's payment to Abel.

This is a simple non-zero-sum situation in that replacing Abel's Package with Baker's Package* makes both parties better off.

A. *The Dynamics of Zero-Sum Bargaining*

Jim wants to buy a 1975 Buick. He goes to Olivia's Used Cars and sees one he likes. The price marked on the windshield is $5,999. Although Jim is certain that Olivia will sell the car for less, he does not know exactly how far down she will come. It happens that the clutch is seriously worn and the transmission is not in good shape. Knowing this, she is willing to sell the car for as little as $4,500. Jim has looked the car over and driven it around the block. He decides that he is willing to go as high as $5,500. Assume that Jim's only concern is to buy the Buick for as little as possible and Olivia's only concern is to get as much as possible.[114]

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more than I enjoy attending a performance by the Boston Symphony Orchestra. For one thing, I cannot do both things at once (at least not without causing a crisis at Symphony Hall) so I will have to make the comparison by memory. For another, it may be that the difference in pleasures attached to the two activities differ qualitatively and thus cannot be compared. Although I see the theoretical merit to these protests, I am unpersuaded. Somehow I manage to make this sort of comparison every day. I'll bet you do too.

114. This is a highly controversial assumption. *See generally* Kennedy, *supra* note 24. It may well be that Jim and Olivia are also motivated by a desire to reach a fair result or that each of them wants the other to be satisfied by the deal they strike. We might expect these concerns to surface if Olivia and Jim are sister and brother, good friends, or business acquaintances with expectations of a long relationship. These motivations would be less likely to predominate if Olivia and Jim have had nothing to do with each other before and expect to remain strangers after the sale of the car.

It is not my purpose here to assert that the sort of single-minded selfishness that I assume here can ever be found. I believe that it can be found in some degree in nearly all negotiations and I believe that degree to be very high on used car lots.

The figure below describes their positions before they begin to negotiate a deal for the sale of the car.

Olivia's Limit (OL)	Jim's Limit (JL)
/	/
$4,500	$5,500

The points on the line represent prices for the car. The prices increase as one moves to the right along the line. The points from Olivia's limit (the lowest price she will take for the car) and Jim's limit (the highest price he will pay for the car) represent sale prices that would satisfy both. Together, these prices are called the "bargaining range."[115] Olivia wants the price to be as far to the right as possible and Jim wants it to be as far to the left as possible.

As they begin to negotiate, each has some notions about the other's limit. Jim knows that Olivia's limit is no higher than $5,999 (the marked price), and probably less. He has a hunch that she might go as low as $5,000. Olivia suspects that Jim is willing to pay more than, say $2,000, or he would not have the nerve to discuss the sale of the car at all. Her best guess at this point is that Jim might be willing to pay $4,000.[116] Jim's impression of Olivia's limit is represented on the figure below as

115. G. BELLOW & B. MOLTON, THE LAWYERING PROCESS: NEGOTIATION 58–59 (1981) and L. BACOW & M. WHEELER, *supra* note 105, at 34–38. For other terminology, see H. RAIFFA, *supra* note 65, at 45 ("zone of agreement").

There is also alternative terminology for what I call upper and lower "limits." H. RAIFFA, *supra* note 65, at 45 ("resistance points"), G. BELLOW & B. MOLTON, *supra*, at 30 ("resistance point"), and L. BACOW & M. WHEELER, *supra* note 105, at 36 ("reservation level").

If Olivia's lower limit is above (or to the right of) Jim's upper limit, then there is no bargaining range and any agreement for the sale of the car would represent irrationality on the part of either Jim or Olivia.

116. Olivia's thinking may not be so simple. Even if her best guess regarding Jim's upper limit is $4,000, she may also have a sense that he could go as high as $6,000. She might have an array of feelings regarding Jim's limits and she might have a sense of their respective likelihoods of being accurate. To continue with these speculations, let us say that Olivia's sense of Jim's limit is represented by the following table:

Possible Limit	*Likelihood of Accuracy*
$2,000	10%
3,000	20%
4,000	60%
5,000	5%
6,000	5%

Under certain circumstances having to do with Olivia's aversion to risk (*see infra* notes 198–200 and accompanying text) Olivia should treat this sense of Jim's limit as being $3,750 (the sum of possible limits discounted by their respective probability).

The sort of thinking I attribute to Olivia (putting her sense of Jim's limit at $4,000) may be a simplification of another sort. She may not make any specific guess at all. In other words, she may not think thoughts like "Based on how this guy has behaved so far in our discussion, I think he will pay $4,000." Her responses to Jim's dickering may be more instinctive. After years of dealing with potential buyers, she may simply respond to Jim's behavior with counteroffers without going through the explicitly rational thinking I suggest here.

For my purposes, neither simplification is an oversimplification. If Olivia has the elaborately explicit sense of Jim's limit that is expressed in the table above, then it is possible to translate that sense into a single figure that would be used in my discussion in place of the $4,000 figure I have used.

If Olivia's behavior towards Jim is more instinctive, then it is harder to reduce her bargaining strategy to a single figure. Nevertheless, I think even her instinctive bargaining would have the same dynamics as I describe in the $4,000 example in the text. The difficulty would be in finding the precise figure that would allow us to make an explicitly rational model of her instinctive negotiating behavior. The difficulty is unimportant here in that I am not describing any particular negotiation. There is no real Olivia or Jim whose dealings I seek to describe. It is enough for me that Olivia's dealings

OAL (Olivia's Apparent Limit). Olivia's impression of Jim's limit is labeled JAL (Jim's Apparent Limit).

JAL	OL	OAL	JL
/	/	/	/
$4,000	$4,500	$5,000	$5,500

During her negotiations with Jim, Olivia strives to:

1. Discover Jim's limit (JL)—If she can discover it, she will be able to hold out for that price.
2. Move Jim's limit (JL) to the right—She need not know Jim's limit in order to do this.
3. Move Jim's impression of her limit (OAL) to Jim's limit (JL)—If Jim becomes convinced that Olivia will not bring her price down to $5,500, then he will stop negotiating and Olivia will lose the deal. Otherwise, Olivia wants her apparent limit (OAL) to be as far to the right as possible.

Jim has corresponding goals. That is, he will try to discover Olivia's limit (OL), move that limit to the left and convince Olivia that his limit is just to the left of her limit (move JAL to OL).

The conversation might begin something like this:

Jim: I am interested in buying that Buick, but I am unwilling to pay more than $3,500. (Lie #1)	Jim conceals the fact that he is willing to pay $5,500. He is trying to move Olivia's estimate of his willingness to pay (JAL) toward $3,500. He is also looking at Olivia's reaction to his offer, trying to get information about her limit (OL).
Olivia: You have to be kidding. This is a solid car. (Lie #2) I can knock a couple of hundred dollars off the price, but that is all. (Lie #3)	This response serves two functions for Olivia. It put pressure on Jim to move his limit (JL) to the right on the ground that the car is even better than Jim initially thought, and it suggests that Olivia believes she can get close to $5,800 for the car, locating OAL near that figure.
Jim: I can't possibly pay anything close to that. I just don't have that kind of money. I can't afford to pay you more than $4,000. (Lie #4)	Jim tries to locate JAL towards the left, that is, near $4,000.

Each statement contains at least one lie that serves the goal noted in the right-hand column. Jim and Olivia have attempted to deceive each other in the way

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with Jim will be consistent with the notion that she has some single figure as an estimate of his willingness to pay for the Buick.

Thelma deceived Frances.[117] If they were as clever as Frances was in her deception of Thelma,[118] the conversation might have gone like this:

Jim: I am interested in buying that Buick, I'll give you $3,500 for it. (Deception #1)	Jim conceals the fact that he is willing to pay $5,500. He is trying to move JAL toward $3,500. He is also looking at Olivia's reaction to his offer, trying to get information about her limit (OL).
Olivia: You have to be kidding. You drove the car. You saw how well it runs. (Deception #2) But you look like a nice guy. Tell you what I'll do. I'll knock a couple of hundred dollars off the price, but don't ask me to go any further. (Deception #3)	This response serves two functions for Olivia. It puts pressure on Jim to move his limit (JL) to the right on the ground that the car is even better than Jim initially thought, and it suggests that Olivia believes she can get close to $5,800 for the car, locating OAL near that figure.
Jim: My God that's a lot of money. I really don't want to pay that much. I have a lot of expenses. But I really like the car. I suppose I can scrape together $4,000. (Deception #4)	Jim tries to locate JAL to the left, that is, near $4,000.

The lies have been replaced by other forms of deception. The deceptions serve exactly the same purposes as the lies that they replaced and they do so in the same way. There are two points of view from which we can ask whether the distinction between lies and other forms of deception is worth making. First, we can look at the question from the perspective of either of the participants (Jim or Olivia). Second, we can look at the question from the more social point of view I have called "efficiency," that is, with an eye towards maximizing the total satisfaction of Jim and Olivia.[119]

From the participants' individual points of view, the answer would depend on whether their relative abilities in the techniques of deception differ. If Jim is a much better liar than Olivia, but only marginally better at other forms of deception, then Jim (and Olivia) will see the distinction as significant. If Jim's superiority in lying is equal to his superiority in other forms of deception, then the distinction would be unimportant to him (and to Olivia). They care only about the price.[120] If use of lies (as in the first version of the conversation) yields a different price from use of other

117. *See supra* notes 30–32 and accompanying text.
118. *See supra* notes 34–46 and accompanying text.
119. *See supra* notes 106–09 and accompanying text.
120. *See supra* note 114 and accompanying text.

forms of deception (as in the second version), then Jim and Olivia would see the distinction as important.

This importance disappears when the distinction is considered in terms of efficiency. We care only that Jim and Olivia come to some agreement for the sale of the Buick. The price, the only thing Jim and Olivia care about, is unimportant. This negotiation is a zero-sum game.[121] The higher the price, the more Olivia likes it and the less Jim likes it. In terms of efficiency, the total effect of changing the price is zero.[122]

Thus there is no support for distinguishing between lying and other forms of deception in the determination of the particular settlement parties to a zero-sum negotiation select from the many possible settlements that make up the bargaining range. Likewise, there is no support for any other rule, such as a rule permitting all forms of deception (including lying) or a rule outlawing all deception. By definition, all settlements in zero-sum negotiations are efficient.

The question, then, becomes does the convention forbidding lying and permitting other forms of deception encourage or discourage resolutions? For it is also true, again by definition, that failure to reach a settlement is inefficient where there is a bargaining range. Some analysts of negotiation observe these sorts of deceptions in negotiation without hazarding an opinion as to whether the process of negotiation is enhanced or impeded by them.[123] The American Law Institute goes a little beyond neutral observation: "Hard bargaining between experienced adversaries of relatively equal power ought not to be discouraged."[124] But it has been left to Thomas Schelling to attempt an explanation of the social usefulness of deception. He argues that zero-sum negotiations cannot lead to agreement without the sorts of deceptions discussed here.

> There is some range of alternative outcomes in which any point is better for both sides than no agreement at all. To insist on any such point is pure bargaining, since one *would* take less rather than reach no agreement at all, and since one always *can* recede if retreat proves necessary to agreement. Yet if both parties are aware of the limits to this range, *any* outcome is a point from which at least one party would have been willing to retreat and the other knows it! There is no resting place.[125]

Ross comments that "This situation presents a large range of potential agreement, but, parodoxically, it may result in no agreement whatsoever."[126]

This notion can be illustrated in Jim's negotiation with Olivia over the sale of the Buick. If Jim were to learn from a reliable source that Olivia would be willing to sell

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121. *See supra* notes 111–13 and accompanying text regarding the distinction between zero-sum and non-zero-sum elements.

122. *See supra* notes 102–04, 106 and accompanying text regarding other criteria for evaluating negotiations.

123. James J. White takes the position that these sorts of deceptions are "inherent in all negotiations," that they are "the essence of negotiation" and that they are "normal." White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. 926, 927, 928 and 932. Guernsey says that they are to be "expect[ed]." Guernsey, *supra* note 77, at 115.

124. RESTATEMENT (SECOND) OF CONTRACTS § 176 comment f (1981).

125. T. SCHELLING, *supra* note 20, at 22, *reprinted in* H. ROSS, *supra* note 20, at 159, n.17 (emphasis in original).

126. H. ROSS, *supra* note 20, at 159. Carl M. Stevens agrees. *See* C. STEVENS, STRATEGY AND COLLECTIVE BARGAINING 34–37, 63 (1963).

the car for $4,500 or more, then Jim will be able to insist that the price be $4,500. If instead Olivia were to learn that Jim is willing to pay $5,500, then that will be the price. Schelling's point is that if Jim knows Olivia's limit and she knows his, then they will not be able to reach an agreement. Olivia will refuse to agree to any price under $5,500 because she knows Jim is willing to pay $5,500. Jim will refuse to pay any price over $4,500 because he knows Olivia is willing to come down to that price.

As Ross comments, it is an interesting paradox. But it does not reflect reality. Once Jim and Olivia know each other's limits, traditional bargaining becomes impossible. Nevertheless, they will reach a deal. They will simply find another way to do it.[127] For example, they could put several prices on slips of paper and draw one from a hat, call in a third party to set the price, or find an objective standard such as the average sale price of similar cars.[128]

Zero-sum negotiations are competitive by definition. The kinds of deception discussed here are useful to individual negotiators as tactics for claiming a larger share of the pie. But from the point of view of efficiency, the results of these competitions make no difference. One negotiator's gain is offset by another's loss. In terms of efficiency, we care only that the parties reach an agreement in cases where their bargaining limits overlap.[129] "Hard bargaining" is a mechanism for reaching settlements. Schelling has pointed out the dependence of this mechanism on concealment of the negotiators' bargaining limits.[130] I have argued that Schelling is correct if negotiators are confined to hard bargaining, but that they are not so confined. If my argument is correct, then deception does not encourage settlements in zero-sum negotiations. Neither Schelling's position nor my attempt to limit its application depend on the technique of deception used. Thus, on this ground, it makes no sense to prohibit lying while allowing other forms of deception.

Moreover, there is reason to believe that the practice of concealing one's bargaining limit can impede settlement. Negotiators commonly receive the advice, "Make your first demand very high."[131] In terms of the negotiation between Olivia and Jim over the sale of a Buick, Jim might have begun by offering only $1,000. Jim's motive would be to move his apparent limit (JAL) to the left.

JAL	OL	JL
/	/	/
$1,000	$4,500	$5,500

There is a danger in the use of this tactic. If Jim is too convincing, that is, if he succeeds in making Olivia believe he is serious about the $1,000 offer, she may not

127. Each year I give the students in my Negotiation class a problem like this. The vast majority of the students find a way to reach agreement. They have a much harder time if they are unaware of the other's knowledge. This difficulty is not the product of Schelling's paradox. It has to do with personalities. *See* R. FISHER & W. URY, *supra* note 67, at 17–40, and Bazerman, *supra* note 106, at 211.

128. *See* R. FISHER & W. URY, *supra* note 67, at 84–98.

129. *See supra* note 115 and accompanying text.

130. To be more precise, Schelling argues that bargaining fails where both negotiators reveal their bargaining limits. If only one negotiator does so, then there will be a settlement. *See supra* note 116 and accompanying text.

131. Meltsner & Schrag, *Negotiating Tactics for Legal Services Lawyers*, 7 CLEARINGHOUSE REV. 259, 261 (1973), *reprinted in* H. EDWARDS & J. WHITE, PROBLEMS, READINGS AND MATERIALS ON THE LAWYER AS NEGOTIATOR 133, 137 (1977).

think it possible to get him up to her lower limit (OL) of $4,500. If she breaks off the negotiation without letting Jim know that she is willing to come down to something under Jim's actual maximum (JL), then the sale will not be made. Such a result would be inefficient.[132] To the extent negotiators seek to conceal their bargaining limits (through lies or other deceptions) there is a danger that efficient deals will be lost.

In addition, many people, even lawyers, object to being deceived. Cold rationality can give way to hurt feelings and hostility.[133] Fisher and Ury take the position that conflicts of personality interfere with, rather than assist, the settlement process.[134]

B. *The Dynamics of Non-Zero-Sum Bargaining*

By the term "non-zero-sum," I intend to refer to an element of negotiation that occurs in a pure form as rarely as pure zero-sum negotiations. This element deals with making the pie bigger without concern for how it will be divided up. Hester has been playing tennis for several years and owns a very nice racquet. She knows Ivan, a man who owns a typewriter that he no longer uses. Hester has recently decided that she no longer wants to play tennis but instead wants to become a novelist. She would rather have Ivan's typewriter than her racquet. Ivan would like to take up tennis and would rather have Hester's racquet than his typewriter. Neither has anything else of value to the other.[135] We could imagine them having the following conversation.

Hester: I'm sick of playing tennis. I wish I had a typewriter so that I could try writing a novel.

Ivan: I have an old typewriter and would very much like to take up tennis. Why don't we trade, my typewriter for your tennis racquet.

Hester: Okay.

Unlike the discussion between Jim and Olivia over the sale of a 1975 Buick, Ivan and Hester have made no attempt to deceive each other about what they want. From the point of view of each of them as well as from a more general point of view, this has been an efficient negotiation. It could have gone otherwise.

Hester: I'm bored. I think I'll take up a new hobby.

Ivan: I know what you mean, I think I will too. What do you plan to try?

Hester: Oh I don't know. I will have to give it some thought. How about you?

Ivan: The same as you, I guess. I really don't know.

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132. Where the negotiators' bargaining limits overlap, any deal within the overlap is more efficient than no deal at all. Here both parties would have preferred a deal for the sale of the car at a price between $4,500 (Olivia's limit) and $5,500 (Jim's limit). *See supra* note 115 and accompanying text.

133. *See* Bazerman, *supra* note 106, at 216.

134. R. FISHER & W. URY, *supra* note 67, at 17–40.

135. This requirement is unlikely to occur in civilized society, where most everyone values money and everyone has some.

Both have lied. Hester knew she wanted to write a novel and that she needs a typewriter. Ivan knew that he wants to take up tennis and needs a racquet. From their individual points of view, this conversation is inferior to the preceding version. In the first conversation Hester got the typewriter she wants and Ivan got the racquet he wants. In the second, neither got what he or she wanted. The second conversation is inefficient from a social point of view for the same reasons. The total satisfaction of the participants is lower after the second conversation than after the first.

The second conversation seems a little odd. Unless Hester and Ivan dislike each other or share an extraordinary sense of privacy, their failure to state their preferences is perverse. Neither has anything to gain from the other by this concealment. We could understand Jim and Olivia being cautious about their bargaining limits because revelation by one of them would allow the other to insist on a better price. Removing the competitive element removes the motivation for deception, if material acquisition is the goal.[136] Again, it makes no difference what form of deception is used. Hester and Ivan could have avoided the issue or stated a literal truth in a deceptive manner without changing this analysis.

In the case of zero-sum bargaining we found that each party is driven to deceive the other. This arises from the fact that if only one party is truthful, that party will suffer at the hands of the deceiving party. This motivation for deception is lacking in pure non-zero-sum negotiations. As seekers of efficiency, we should not applaud deceptions (lies or other tactics) when they occur in zero-sum games, however reasonable it might be to expect them. In the case of non-zero-sum negotiations, the use of such tactics interferes with reaching efficient results, and we deplore the inefficiency they introduce.

C. *The Dynamics of Real-Life Negotiations*

It is hard to imagine actually encountering a pure zero-sum negotiation or its opposite. The negotiations we engage in always contain elements of both. The mix can vary. Sometimes the zero-sum elements predominate, sometimes not. I am speaking here of the matter to be negotiated. I am not speaking of the personalities of the negotiators, although negotiating styles have a great deal to do with what is actually discussed in the negotiation, not to mention the tone of the discussion.[137] Some matters to be negotiated offer more opportunities to increase the size of the pie than others. This is a characteristic of the subject matter itself. In the negotiation between the two sisters over an orange[138] the non-zero-sum element dominated because one sister wanted the juice and the other wanted the peel. If both sisters had wanted the juice, then the zero-sum element would have been more apparent.

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136. In reality, the availability of other things of value, especially money, makes Hester and Jim's caution more understandable. *See infra* notes 147–48 and accompanying text.

137. *See* G. WILLIAMS, *supra* note 104, for a study of the effect of negotiating styles on the processes and outcomes of negotiations.

138. *See supra* notes 106–07 and accompanying text.

Consider the effect of combining these elements. Angela and Beth own five parcels of land as tenants in common.[139] They have decided to dissolve their common ownership in favor of individual holdings. Because of the cost of surveying, the only practical way to divide the land is to do so by parcels. They cannot subdivide any parcel.

The parcels are not identical and the parties value them differently. Lot A has frontage on the ocean. Lot B has a small house on it. Lot C is very large and undeveloped. Lot D has a small pond filled with game fish. Lot E is much smaller and less valuable to Angela and Beth than the other four.[140] Angela loves the ocean and would like to live in the house on Lot B. Beth enjoys fishing and long walks in the wilderness. We can quantify their affection for the parcels through the use of a unit of measure—say, affection points.[141] Angela likes the ocean more than she likes fishing, so she assigns more affection points to Lot A than to Lot D. The following table represents one possible quantification of the parties' respective affections for the five parcels. Serious difficulties arise from attempts to measure one person's satisfaction against another's.[142] Fortunately, interpersonal comparisons of this sort are not necessary for this analysis. It is important to note that Angela's affection points do not need to be compared to Beth's. The table says that Angela prefers Lot B to Lot C and that Beth prefers the reverse. It does not say that Angela's attraction to Lot A is greater than Beth's. I have chosen the scale of their points to emphasize their lack of comparability.

Lot	*Points (Angela)*	*Points (Beth)*
A (ocean)	100	8
B (house)	100	8
C (large)	70	10
D (pond)	60	10
E (small)	10	1

Given this information, we can evaluate each of the possible distributions of these parcels[143] from the point of view of the parties individually as well as from the point of view of efficiency.

Let us assume Angela and Beth negotiate selfishly. Neither has any concern for the other. Each cares only about maximizing her own point total. In theory, the best Angela can do is 340 points. This requires Beth to bargain away all five parcels with nothing in return. Such a result is sufficiently implausible that we would question

139. This example is taken from an exercise used by Michael Wheeler in his negotiation courses.

140. By setting out the descriptions of the various lots in this way, I have sidestepped the claim that deception serves efficiency by promoting the generation of information. The argument would hold that Angela and Beth would be less likely to know, among other things, that Lot D has a pond if they were not allowed to deceive each other. For my response to this argument, see *supra* note 108.

141. *See supra* note 113, regarding the problems associated with this utilitarian effort to quantify satisfaction in this way.

142. I may know that I like chocolate ice cream more than vanilla, but I am less confident about whether the pleasure I get from eating chocolate ice cream is greater than the pleasure you get from eating it.

143. Theoretically, there are 128 possibilities.

whether it could have been the result of selfish negotiation. It is more likely that each would end up with one or more parcels.

Some results are obviously inferior from the point of view of either party and in terms of efficiency. Consider the following proposed distribution. The relevant values of the lots (in affection points) are noted in parentheses.

Distribution I

Angela	C(70), D(60), E(10)	140 Angela Points
Beth	A(8), B(8)	16 Beth Points

By exchanging Lots A and C, we achieve a better result from all points of view.

Distribution II

Angela	A(100), D(60), E(10)	170 Angela Points
Beth	C(10), B(8)	18 Beth Points

Angela has gained thirty Angela Points and Beth has gained two Beth Points. To evaluate these distributions from the point of view of efficiency, we must consider both categories of points. We can say the exchange has improved the distribution because we find increases in both Angela Points and Beth Points. Exchanging Lots B and D introduces further improvements of the same kind.

Distribution III

Angela	A(100), B(100), E(10)	210 Angela Points
Beth	C(10), D(10)	20 Beth Points

This distribution is said to be Pareto-optimal in that no more changes can be made without making at least one of the parties worse off.[144] Beth would like to increase her point total by taking Lot E. Angela will resist this because it would reduce her point total.[145] Because we cannot compare Angela Points to Beth Points,[146] we cannot say whether taking Lot E from Angela and giving it to Beth would be an improvement from an efficiency point of view.

The following diagram represents these dynamics.

144. *See* Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512–13, 517–18 (1980).

145. Assuming she is selfish. *See supra* note 114 and accompanying text regarding the controversial nature of this assumption.

146. *See supra* note 114 and accompanying text.

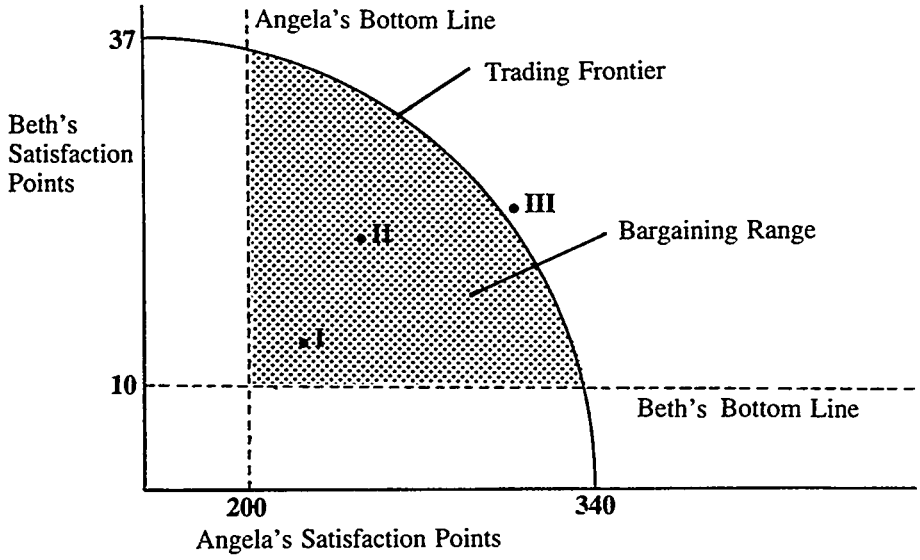

Figure 1

There are many possible Pareto-optimal distributions. They are represented by the trading-frontier curve in the diagram. Distribution III is therefore on the curve. It is marked "III" in the diagram. Any settlement between Angela and Beth that falls below the curve (Distributions I and II, marked "I" and "II" on the diagram) can be improved in the sense that at least one of the parties can be made better off without making the other worse off. There are no possible distributions above the curve. To the extent that Angela and Beth work from points under the curve towards points on the curve, the non-zero-sum element of their negotiation dominates. To the extent they move from one point on the curve to another point on the curve, the zero-sum element dominates. In terms of efficiency, as defined in this Article, only the former is important. Movement along the curve is irrelevant in terms of efficiency, although it is important from the points of view of the parties individually.

Ideally, we might like to separate the negotiation into two phases. First, the parties would set out their respective preferences in order to make the pie as large as possible. Then they could go about dividing it. The problem is, these operations are conducted simultaneously.

Imagine how Angela and Beth might negotiate. Remember that Angela likes the ocean and Beth likes fishing and assume that neither knows the preferences of the other. Angela might consider saying, "I like the ocean very much and don't care for fishing. Why don't you take Lot D and I'll take Lot A." For Angela, this beginning would have an advantage over randomly assigning the lots in that it may be that Beth does not want the ocean lot and would like the fishing lot. This happens to be the case, although Angela does not know it. Secrecy about Angela's preference would have the same disadvantage as secrecy had in the negotiation between Hester and Ivan

over the typewriter and the tennis racquet.[147] But this case differs from that example in that Angela's openness could be used against her. Beth might answer (falsely) that she too prefers the ocean lot but would be willing to take the fishing lot plus Lot E instead. Of course, Beth has to be clever. If she insists on her feigned preference with too much vigor, Angela might decide that she (Angela) would have to give up too much to get the ocean lot and decide to let Beth take it.[148]

Angela and Beth have the same incentive to hide their preferences as Jim and Olivia had to hide their respective bargaining limits in their negotiation over the sale of the Buick,[149] and they have the same incentive to be open about their preferences as Hester and Ivan had in their negotiation over the tennis racquet and typewriter.[150]

Earlier I claimed that while deception concerning one's own bargaining limit is valuable to individuals engaged in zero-sum bargaining, it is of doubtful value from the point of view of efficiency.[151] In non-zero-sum negotiations, the use of deception is not valuable from the parties' points of view or in terms of efficiency.[152] Furthermore, the distinction between lying and other forms of deception is irrelevant in these contexts.[153]

These idealized situations, pure zero-sum and pure non-zero-sum, do not occur. Every real negotiation is a mixture. To some extent, Angela and Beth share the hard-bargainers' position on deception in its various forms. They might decide to conceal their preferences in order to avoid having to pay a premium for the satisfaction of those preferences. Angela and Beth would see a distinction between lies and other forms of deception as being important if their relative abilities to lie differ from their relative abilities in other forms of deception.[154] On the other hand, the more complicated the negotiation,[155] the more clever the deceptive negotiator must be. In his quest to buy a Buick, Jim had to avoid appearing to commit to a maximum offer that was below Olivia's minimum. He could devote his full attention to that single issue.[156] Angela and Beth must play five such games at the same time. They have to be truthful and forthcoming enough to avoid "leaving money on the table" and yet deceptive and secretive enough to avoid "having their pockets picked."[157] A mistake by either of them could lead to a distribution that is not Pareto-optimal.

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147. *See supra* notes 135–36 and accompanying text.

148. Thelma was clever in this way when she pretended she did not want to sell her plastic tea set to Frances. *See supra* note 32 and accompanying text.

149. *See supra* notes 116–17 and accompanying text.

150. *See supra* note 136 and accompanying text.

151. *See supra* notes 116–19, 123–34 and accompanying text.

152. *See supra* note 136 and accompanying text.

153. *See supra* notes 120–30, 135–36 and accompanying text.

154. Their perspective on the distinction would be analogous to that of Jim and Olivia in the Buick case. *See supra* note 120 and accompanying text.

155. The land distribution was more complicated than the Buick case because there were five variously valued parcels in the former versus only one Buick in the latter.

156. *See supra* note 132 and accompanying text.

157. "If you in fact disclose the true identity of your cards, then I will probably be able to pick your pocket as cleanly as a cheating poker player." Rubin, *Negotiation, An Introduction to Some Issues and Themes*, 27 AM. BEHAV. SCI. 135, 137 (1983). Rubin suggests that negotiators need to be able to "walk the tightrope between complete honesty and openness and total misrepresentation." *Id.* This leads scholars to suggest strategies ranging from the mystical—"Use negotiation jujitsu" (R. FISHER & W. URY, *supra* note 67, at 112, 113)—to the oxymoronic—"flexible rigidity" (Pruitt, *Strategic Choice in Negotiation*, 27 AM. BEHAV. SCI. 191 (1983)).

This may not be disturbing to either of the parties. Each cares only to maximize her own points. Angela would prefer a non-optimal settlement that gives her 230 points to a Pareto-optimal distribution that only gives her 200 points.[158] In short, Angela might find it easier to increase her share of a smaller pie than to increase the size of the pie.

The opposite is true when we examine the usefulness of deception from the point of view of efficiency. We care only that the result be Pareto-optimal. Full disclosure of one's preferences permits optimality. Concealment impedes it. Furthermore, Schelling's argument in favor of concealment in zero-sum situations[159] does not apply in this context. Schelling's paradox arises from the inability of the negotiators to settle on one point in the bargaining range once the limits of the range are known to both sides. If, contrary to my arguments,[160] Schelling's paradox applies to actual negotiations, then there is a danger that there will be no settlement when efficiency demands that there be a settlement. Revealing one's preferences, rather than one's bargaining limit, does not threaten the ability of the parties to reach a settlement in this way.

Suppose Angela had set her bargaining limit at 200 Angela points and Beth had set hers at 10 Beth Points. They could have revealed their personal preferences among the lots without revealing these bargaining limits. As was the case with the pure zero-sum negotiation (Buick) and the pure non-zero-sum negotiation (tennis racquet and typewriter), it is the fact of deception that is important, not the method of deception. The distinction between lies and other forms of deception is irrelevant. In the case of real negotiations (mixtures of zero-sum and non-zero-sum elements), the effect of concealing one's preferences is inefficient, though of some use to the individual bargainer's effort to get a larger share of the pie.

D. *Disclosure of Facts about the World*

In this Article, I have used the word "convention" in connection with the prohibition against lying and the acceptance of other forms of deception. I have done so because the primary focus of my study has concerned statements about a negotiator's preferences. I have avoided using the word "rule" because enforcement of the prohibition does not involve the power of the state through criminal sanctions or civil liability. I can abandon that caution in treating, however briefly, statements about the world.

The law of fraud comprises rules regarding the rights of negotiators to deceive each other about these "external" matters. These rules distinguish between lies and other forms of deception. The example of *Laidlaw v. Organ*[161] has already been discussed in this connection.[162] But the nature of the information addressed by the

158. For example, a settlement that gives Angela Lots B, C and D (worth 230 points) is not Pareto-optimal because both parties would be helped if Angela traded Lot D for Lot A. Nevertheless, Angela would prefer such a settlement to the Pareto-optimal distribution that gives her Lots A and B (worth 200 points).

159. *See supra* note 126 and accompanying text.

160. *See supra* notes 130–31 and accompanying text.

161. 15 U.S. (2 Wheat.) 178 (1817).

162. *See supra* notes 58–61 and accompanying text.

rules of fraud make the situation more complicated than the situation concerning preferences. This is because a negotiator can be expected to know his or her own preferences. When you negotiate to buy my house, you know the maximum price you are willing to pay. There is no question of *producing* this information.

The same cannot be said where the information is "external." I might not know that the house I want to sell you has termites. Thus, the rules of fraud must be evaluated, at least in part, according to their propensity to motivate the discovery of this sort of information. If, for example, you cannot recover in fraud (or, more likely, rescind the sales contract) for my failure to detect the presence of termites and to communicate that fact to you, then you will have an incentive to inspect the house for termites before buying it. If early detection of termites makes economic sense,[163] then the rules of fraud (or contract generally) ought to be drafted in a way that someone[164] is motivated to do so.

There is a wide range of possible rules ranging from putting the seller of the house under an absolute obligation to discover and reveal all facts the buyer might find relevant, to giving the seller the right to lie through his or her teeth about everything.[165]

Kronman suggests requiring a party to disclose only that information that a) is known to the party,[166] and b) has been discovered "casually" rather than as a result of a "deliberate search."[167] Evaluating Kronman's rule or any alternative with the efficiency criterion I have used in this Article is unsatisfying in its indeterminancy. It is simple enough to include the creation of information in my general definition of efficiency. As I use the term, it requires that settlements be Pareto-optimal.[168] If the parties are ignorant about the subject of their negotiation, then only luck will produce an efficient result.

Recall the two people fighting over some oranges.[169] One wanted only the peels (for baking) and the other wanted only the juice. The efficient result gave the peels to the first person and the juice to the second. Giving each party half the oranges was characterized as inefficient. Now imagine that instead of fighting over oranges, the two are fighting over a shipment of crates. It happens that the crates contain oranges. If neither party knows what the crates contain, it will be impossible to divide the shipment efficiently.

The same would be true of the division of lots between Angela and Beth. If neither knows of the pond on Lot D, then only chance will deliver it to Beth, who,

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163. In terms of cost/benefit analysis, it makes sense to search for termites only if the damage prevented by such inspections exceeds the cost of the inspections.

164. The "someone" could be the buyer, seller, insurance company, government.

165. *See* Kennedy, *supra* note 24, at 583.

One way to understand this issue is in terms of the extent of private property in information. As we push the law of fraud from caveat emptor to liability for concealment, then to liability for non-negligent failure to disclose, and finally to a duty to generate the information as well as share it, we are "socializing" a resource. *Id.*

166. It would be possible to require the disclosure of information a party "ought" to have acquired.

167. Kronman, *supra* note 59, at 13.

168. A settlement is Pareto-optimal if there is no alternative that would make one party better off without making the other party worse off.

169. *See supra* note 106 and accompanying text.

for the sake of efficiency, ought to have it.[170] So the discovery of information about the world (the contents of the crates or the topology of Lot D) makes efficient results possible.

Deciding which of the many theoretically possible rules of disclosure would be most likely to promote the discovery of information about the world is a difficult empirical question. If I am correct in my claim that efficiency requires full disclosure of each party's preferences,[171] then it would be nice if whatever rule we choose for external statements—that is, statements about the world—would be consistent with a preference-disclosure convention.

Thus, I am led to oppose Kronman's suggestion in favor of a rule requiring the disclosure of any relevant information known. A rule permitting Beth to keep secret the fact there is a pond on Lot D would be of little use to her if convention were to require the confession of her preference for Lot D.

Kronman would attack my full-disclosure rule on the ground that people will not go to the trouble of discovering information if they have to give it away to their counterparts in negotiation.[172] Fried illustrates the point with an example involving the sale of land. He says that if the rules of negotiation were to require me to tell you about the oil on your land before we agree on a price for the sale of the land to me, then I would be less likely to have looked for the oil in the first place. You would be less likely to undertake the investigation yourself if you can rely on me to be forthcoming.[173]

This argument is not without virtue. If I am undecided about whether to look for oil on your land, the knowledge that I can deceive you about any oil that I ultimately find might tip the balance in favor of undertaking the search. I have two responses. First, even if the rule permitting deception does in negotiation encourage exploration for things of value, this fact alone cannot justify the rule. If it did justify the rule, then we could also justify rules that would allow lying and even the use of duress in negotiation. Imagine how eager I would be to look for oil on your land if I knew that I could compel you to sell the land to me by holding a gun to your head. We do not have rules that permit this sort of force to be used in negotiation because there are negative aspects of such rules that outweigh the their pro-exploration tendencies.

Second, incentives to discover value would remain even if we were to have rules against deception. If I suspect that there might be oil on your land, I can tell you so and we can strike a deal before exploring the land. I have a financial incentive to bring my suspicions to your attention if the chance that you will turn me down is sufficiently small. You might turn me down if you think that the chance of finding oil is worth the cost of looking for it and you think that you can perform the search.[174]

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170. *See supra* notes 139–48 and accompanying text.

171. *See supra* Part IV.

172. This idea has obvious analogies in the law of patent and copyright, each of which grants a temporary monopoly to the creator in order to induce more creation.

173. C. FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 79–83 (1981).

174. *See id.* at 74–91 for a more complete discussion of this issue.

The great difficulty for Kronman's rule that I see is that its benefits in terms of information generated are very difficult to measure and must balance the problems created by deception in any form in the area of preferences. The two areas are, as a practical matter, linked. If we adopt Kronman's rule and allow the investor in information to withhold it in order to exploit it in negotiation, then we must also allow that negotiator to keep secret his or her preferences. The inefficiencies associated with the concealment of preferences are described in Part IV. Whether the extra information that Kronman's rule would generate (over a rule requiring disclosure of all information, regardless of the manner of its production) would compensate for the costs of preference concealment is an empirical one that cannot be answered with certainty. Yet I cannot help feeling that quantity of extra information would be too small. The reason for the convention permitting deception of the sort Kronman discusses (relating to statements about the world) and of the sort I discuss in Part IV (relating to preferences) must not have to do with this kind of cost/benefit analysis.

V. Speculations on Why We Have the Convention

Based on the foregoing, I make two claims. I claim that the distinction between lying and other forms of deception is not worth making if the criterion is one of efficiency, and I claim that all forms of deception impede efficiency in negotiation. Assuming, as I have,[175] that efficiency is an important goal, why do we permit deception and why do we encourage other forms of deception over lying? In this section I offer some preliminary thoughts.

A. *Must We Permit Deception?*

In every negotiation each party has incentives for deception. That is to say, every negotiation has zero-sum elements.[176] So it may not be surprising that a very large number of society's agreements are generated through negotiations involving deception. Not even the most congenial texts suggest revealing one's bargaining limit. Nevertheless, there are occasions where parties to a negotiation bristling with hard-bargaining opportunities reach agreement without using deception.

The first place to look for examples is among people who have special reasons to care about each other's welfare—families and friends. One might argue that when one family member refrains from the use of deception in any of its forms in negotiating with another, it is because each of the members realizes that the maintenance of good relations is vitally important in the long run. My wife and I might agree that we want to go out to dinner tonight, but disagree about where. She wants desparately to go to Restaurant A. I have a slight preference for Restaurant B. If I were to bargain hard with her on this issue, I would conceal the fact that my preference is slight. My willingness to confess the marginality of my preference could be explained as sacrificing my interest in this particular negotiation in order to

175. *See supra* note 105 and accompanying text.
176. *See supra* note 111 and accompanying text.

preserve my ability to bargain in my own interest in the future. If I give in on this one, I can press hard on the next one. In the long run, I will eat at the restaurant of my choice more often if I go along with her choice tonight.[177]

If this is the reason I give in, then we could hope to eliminate deception from only those negotiations where the parties expect to be negotiating with each other in the future. I do not believe all examples of deception-free negotiations can be explained in this way. Although such matters are difficult to document, it seems to me quite plausible that the reason I agree to go to Restaurant A tonight is that my wife's happiness is immediately valuable to me.

Recognizing that this sort of utopian flight puts the credibility of this Article at risk, I hasten to add that I would expect this romanticism to have limits that would depend on the relationship of the parties. Nevertheless, there is no reason to think that altruism cannot be found in dealings between total strangers.[178]

Moreover, many negotiators, particularly novices and non-lawyers, bring notions of fairness to negotiations that temper their impulse to pursue their own interests through deception. I refer here to a sense of substantive rather than procedural fairness.[179] Some people, if they had the power, would seek a fair result in preference to one that maximizes their own self-interest.

That lawyers evidence little altruism and concern for fairness in negotiations cannot be explained by simply refering to their moral depravity. Lawyers are the fiduciaries of their clients. They must pursue their clients' interests with zeal in a system that proclaims itself to be adversarial.[180] If a lawyer negotiating on behalf of a client decides to abandon deception in the hope of making the pie larger,[181] then it must be with the expectation that the client's smaller share of a larger pie will be at least as large as the larger share of the smaller pie the lawyer could have obtained through hard bargaining.

Of course, lawyers would be free to seek fairness or altruistic goals if their clients instruct them to do so.[182] There are several explanations for the rarity of such instructions. It may be that hard bargaining is an element of relations of power in this country that are so pervasive that our ability to consciously resist them is slight.

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177. If I were extraordinarily crass and clever, I would exaggerate my preference for Restaurant B but state it as something short of "desperate." In this way I would maximize my ability to leverage tonight's concession in future negotiations.

178. *See generally* H. MARGOLIS, SELFISHNESS, ALTRUISM AND RATIONALITY: A THEORY OF SOCIAL CHOICE (1982).

179. *See supra* note 103 and accompanying text.

180. The Comment to Rule 1.3 of the MODEL RULES, *supra* note 52, provides, "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Ethical Consideration 7-19 of the MODEL CODE, *supra* note 52, provides, "An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known . . . ."

181. *See supra* note 157 and accompanying text.

182. Rule 1.2 (a) of the MODEL RULES, *supra* note 52, provides, "A lawyer shall abide by a client's decisions concerning the objectives of representation, . . . A lawyer shall abide by a client's decision whether to accept an offer of settlement or a matter . . . ." Ethical Consideration 7-7 of the MODEL CODE, *supra* note 52, provides, "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer . . . ." Ethical Consideration 7-8 provides, "In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself . . . ."

Foucault's studies of penal and mental institutions, sexuality, and systems of knowledge have led him to conclude that a diverse set of factors[183] can operate somewhat independently and yet produce what he calls an "apparatus" that dominates us in pursuit of a discernable strategy that has been formulated by no one.[184]

On the other hand, several writers have considered the possibility of reducing the level of competition that exists in negotiation. Fisher and Ury have done so by publishing a how-to book on negotiation that simply instructs negotiators to seek common ground and non-competitive solutions.[185] We would expect that negotiators who follow the book's prescriptions would be able to "make the pie bigger." The difficulty that Fisher and Ury do not address is how the parties are to divide the pie. This is a difficulty that must be faced in virtually every negotiation.[186]

Robert Axelrod's work[187] seems to imply that a dedicated group of reformists could flourish by operating on the basis of trust. The strategy might be as follows. A reformist would negotiate openly and without deception with all others, except for proven deceivers, whom the reformists would meet with deception of their own.

His conclusions are based on a pair of computer tournaments he ran beginning in 1979.[188] Game theoreticians were invited to submit strategies for playing a game based on the Prisoner's Dilemma.[189] Each entry encountered every other entry 200

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183. These factors might include, for example "discourses, institutions, architectural measures, scientific statements, [and] philosophical, moral and philanthropic propositions . . ." M. FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977 194 (C. Gordon, ed. 1980).

184. In an interview regarding his studies, Foucault addressed the genesis of a manner of speech among the working class that allowed for the mobilization of the working class for greater productivity: "[T]he moralization of the working class wasn't imposed by Guizot, through his schools legislation, nor by Dupin through his books. It wasn't imposed by the employers' unions either. And yet it was accomplished, because it met the urgent need to master a vagabond, floating labour force. So the objective existed and the strategy was developed, with ever-growing coherence, but without it being necessary to attribute to it a subject which makes the law, pronouncing it in the form of 'Thou shalt' and 'Thou shalt not'." M. FOUCAULT, *supra* note 183, at 204.

He has suggested that the power of one segment of society to exploit other segments of society grows out of and is effected by the language used by the two groups: "Between every point of a social body, between a man and a woman, between a master and a pupil, between every one who knows and every one who does not, there exist relations of power which are not purely a projection of the sovereign's great power over the individual; they are rather the concrete, changing soil in which the sovereign's power is grounded, the conditions which make it possible for it to function." *Id.* at 187.

See also M. FOUCAULT, THE HISTORY OF SEXUALITY (1978) and H.–G. GADAMER, *supra* note 97, at 491–98.

185. R. FISHER & W. URY, *supra* note 67.

186. *See supra* note 111 and accompanying text.

187. R. AXELROD, *supra* note 25.

188. Hofstadter, *Metamagical Themas: Computer Tournaments of the Prisoner's Dilemma Suggest How Cooperation Evolves, Sci. Am.*, 16 (May 1983).

189. The Prisoner's Dilemma, cutely renamed the Prisoners' Dilemma by Ian Hacking (Hacking, *Winner Take Less*, THE NEW YORK REVIEW OF BOOKS, vol. XXXI, no. 11, June 28, 1984, at 17–21), describes the paradoxical situation faced by two prisoners who have agreed not to testify against each other and then are invited to do so by the authorities. The authorities need the testimony of each prisoner to convict the other, and promise each of them a reduced sentence in return for testifying. If neither prisoner testifies, neither will be convicted. If both betray their vow of silence, then both will receive reduced sentences. If only one testifies, then one will receive a reduced sentence and one will receive a harsh sentence. The prisoners have been separated, so neither will know whether the other has kept its word until the time for betrayal has passed. The irony is that both would be better off if they remain silent, yet each will likely testify out of fear that the other will. The Prisoner's Dilemma has been used to describe international relations, business cartels and vote trading. R. AXELROD, *supra* note 25, at 28. Axelrod has found hundreds of references to it in psychological studies (*The Evolution of Cooperation*, 28) calling it "the *E. Coli* of social psychology." *Id.*

times.[190] An encounter consisted in each entrant's program either cooperating or not cooperating. If neither entrant cooperated in a given encounter, then each received 1 point. If both cooperated, both got 3 points. If one cooperated and one did not, the former won 5 points and the latter won no points. The tournament was structured to allow each entrant to remember previous encounters with other entrants. For example, Entrant One might decide to cooperate with Entrant Two in their second encounter because Entrant Two cooperated in its previous encounter with Entrant One.[191] Axelrod then ranked the entrants according to the total number of points won by that entrant in encounters with other entrants. He found that "nice" entrants, entrants that were never the first not to cooperate, did substantially better than other entrants. In other words, he found the practice of presuming the trustworthiness of the other entrants, at least until proven untrustworthy, to be advantageous. This would obviously be true from the perspective of efficiency as I have used the term in this paper.[192] What is surprising is that it also proved to be an effective strategy when viewed from the perspective of the trusting entrant. In this Article I have suggested that a negotiator contemplating a strategy that focuses on problem solving (that is, being open and truthful), must consider the possibility that, even if the strategy produces a bigger pie, the other side may employ hard-bargaining tactics (that is, deception), and take the lion's share. Axelrod's results suggest that the openness and truthfulness may, nevertheless, be a sound approach.[193]

There are two reasons to think otherwise. First, the entrants in Axelrod's tournament knew that they would meet each other two hundred times. Negotiators are less likely to cooperate, and less likely to benefit from cooperating, if there will not be a long term relationship between the parties. Axelrod recognizes the dependency of his results on the duration of the relationship.

> If the strategic setting allowed long enough interactions between individuals, much of the advice pointed to reasons why [sic] an egoist should be willing to cooperate even though there is a short-term incentive not to cooperate. But if the interaction was not very durable, then an egoist would be better off going for short run benefits, and defecting.[194]

A common strategy employed by people playing a finite number of encounters is to cooperate in the early rounds, realizing that early defection will lead to continued defection and low point totals for both players, and to defect as late as possible, but just before the other player decides to defect.

Even more important for the purposes of this Article is the fact that in most cases it is impossible for negotiators to find out whether the other side has cooperated or

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190. In addition, each entry was made to confront itself and a program that behaved randomly. R. AXELROD, *supra* note 25, at 30.

191. *Id.* at 31.

192. Efficiency would apply to Axelrod's tournament in this way: The higher the total number of points won by all entrants, the more efficient the play. *See supra* notes 106–08 and accompanying text. There are three possible results from each encounter: Both cooperate, yielding a total of six points (three for each entrant), one cooperates and one does not, yielding a total of five points (five for the defector and zero for the cooperator) and neither cooperates, yielding a total of two points (one for each entrant).

193. For a discussion of the possibility that ethical norms have arisen as a result of Darwinian survival of the fittest, see R. NOZICK, PHILOSOPHICAL EXPLANATIONS 342–48 (1981). *See also* T. NAGEL, THE POSSIBILITY OF ALTRUISM (1970).

194. R. AXELROD, *supra* note 25, at 124.

not. If it is possible to make the other side believe you are cooperating, when you are not, then you may be able to make a big pie and claim most of it for yourself. Axelrod's tournament rules allowed for the immediate reporting to each entrant the result of each encounter. Entrants then used that information to decide how to treat each other when they met again. To induce cooperation from other entrants, it became necessary to cooperate oneself.[195]

The game could be played differently. We could use people instead of computer programs,[196] and allow them to discuss their plans with the other entrants before beginning the series of encounters. We could then carry out the encounters without reporting the results. Entrants would have to decide whether to cooperate based on their earlier conversations. The winner would be the entrant who could convince the other entrants of his or her plans to cooperate before defecting in each encounter. Where negotiators cannot discover whether the other side has employed deceptive tactics in a previous negotiation, this variant of the Prisoner's Dilemma tournament probably provides a more accurate model of the negotiations faced by practicing lawyers.

B. *Social Effects of Permitting Deception*

The fact that the rules of negotiation permit and reward deception introduces an uncertainty. This is not to say that there would not be other uncertainties even if all negotiators were open and truthful. There would, for example, be uncertainties connected with valuing proposed settlements and in computing one's bargaining limit. If the negotiation involves litigation, the uncertainties of trial will always visit themselves upon the negotiation sessions. But there is a very different sort of uncertainty introduced by rules that allow deception. There is uncertainty about whether a resolution is possible. Such rules give negotiators a way to bluff.

When Jim tried to make Olivia believe that he would pay no more than $3,500 for the 1975 Buick,[197] he was bluffing. Olivia, having been through many such negotiations, suspected as much. She may have believed that he would come up to $5,000. But she could not be certain. If she were to act on her suspicion and hold out for $5,000, then she would have had to accept the risk that Jim would walk away. In fact, Jim would not have walked away, being willing to pay up to $5,500, but she did not know this. If she were unwilling to take the risk that he would walk away rather than pay $5,000, then Olivia would be inclined to make an offer where the risk of Jim leaving would be reduced, say $4,750.[198]

We could imagine that Olivia's aversion to the risk of losing a customer might vary from time to time. For example, she might find that she is less willing to accept

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195. Hoban is less optimistic about the possibility of inducing cooperation this way. After Frances avenges herself against Thelma, R. HOBAN, *supra* note 27, at 50–51, she lectures Thelma about the virtues of friendship. *Id.* at 52–53. The two go to the candy store where Frances shares her hard-won dime with Thelma. *Id.* at 56–57. They each buy candy. *Id.* at 57. Later they run into a mutual friend, Gloria. *Id.* at 58. Frances and Thelma share their candy with Gloria. *Id.* at 62. The three decide to jump rope. Guess who goes first? *Id.* at 59–60.

196. This would, of course, make a tournament of Axelrod's proportions a logistical nightmare.

197. *See supra* notes 117–19 and accompanying text.

198. Jim faced the same sort of bluffing from Olivia and had to deal with the same sort of risk.

the risk when sales volumes are down. We might expect the ultimate sale price of the car to depend in part on the willingness of Olivia and Jim to accept the risk of the other walking away from the negotiation. If Jim's negotiation takes place at a time when Olivia is particularly risk averse, then we would expect the price they agree on to be lower than it would be if the negotiation took place at another time. If this is so, then we can say that the rules of negotiation that permit deception operate against the risk averse through the creation of uncertainty.

The issue is very complicated. Risk aversion depends on what is at risk and who is confronted with the risk. Consider the reactions of two potential risk takers to a variety of situations. The first risk taker is an average middle-class person, a person who finds $1,000 an amount of money too small to make a major change in the person's life but large enough to take seriously. The second risk taker is a large business that has numerous opportunities to take the sorts of risks described below and that finds $1,000 to be less imposing than the first risk taker finds it to be.[199] Each situation described below involves a choice on the part of the two potential risk takers. Choice A involves risk and Choice B involves certainty.

Situation I

Choice A: 90% chance of winning $1,000
Choice B: 100% chance of winning $899

Situation II

Choice A: 90% chance of losing $1,000
Choice B: 100% chance of winning $899

Situation III

Choice A: .1% chance of winning $1,000
Choice B: 100% chance of winning $1.10

Situation IV

Choice A: 1% chance of losing $1,000
Choice B: 100% chance of losing $1.10

The average person will take Choice B in Situation I because winning $899 is a wonderful event, almost as wonderful as winning $1,000. The chance of winning an extra $101 is not worth the 10% risk of coming up empty. The large business sees the choice differently. It knows that it will see this sort of choice often. If it takes Choice B every time, then it will win $899 every time. If it takes Choice A every time, it will win $1,000 most of the time, but will win nothing 10% of the time. Choosing A will, on average, win $900, making it the preferable choice for the business.

199. Although I will use the terms "average middle-class person" and "large business" as a short-hand way of referring to these two categories of potential risk takers, their defining characteristics will not always be found in members of the middle class or in large businesses. I suspect, however, that the characteristics of "the average middle-class" person are more likely to be found in average middle-class people than in large businesses and the characteristics of "large businesses" to be found more often in large businesses than in average middle-class people.

Situation II

Choice A: 90% chance of losing $1,000
Choice B: 100% chance of losing $899

In Situation II, the average person will look at a loss of $899 as something of a disaster, only slightly better than losing $1,000. The 10% chance of avoiding disaster makes Choice A more attractive than Choice B. The business will realize that over the long run, choosing A will cost an average of $900, making Choice B, at $899, the preferable strategy.

Situation III

Choice A: .1% chance of winning $1,000
Choice B: 100% chance of winning $1.10

The average person and the business disagree again in Situation III. The person will take Choice A on the theory that winning $1.10 represents good fortune of insignificant proportion, whereas winning $1,000 would make almost any day a good one. This is one reason people buy lottery tickets. For the business, Choice A represents an average gain of $1.00, which compares unfavorably with the $1.10 to be had from Choice B.

Situation IV

Choice A: 1% chance of losing $1,000
Choice B: 100% chance of losing $110

In Situation IV the average person can avoid the potential catastrophe of losing $1,000 by taking Choice B and paying only $1.10. This is why people buy insurance on their property. Large businesses often do not buy insurance because they are "self insured." They would prefer to lose $1,000 once rather than pay $1.10 a thousand times.

I am tempted to interpret the preferences of the average person in the four situations above as the product of a willingness to risk a small amount against a slight chance to win big,[200] and an aversion to even a small risk of losing big.[201] Yielding to this temptation produces another. I am tempted to say that most negotiations are like Situations I and IV, with respect to the kind of uncertainty created by negotiating rules that permit deception.

The four situations dealt with above involve zero-sum situations. One negotiator can be made better off only at the expense of the other.[202] It is in this sort of

200. This is most obviously represented in Situation III. I would argue that Situation II can also be interpreted in this way. To do so, one must consider that, given the choices available in Situation II, the chooser (here, the average person) considers that the likelihood of losing a substantial amount of money ($899 or $1,000) is so great that the chooser behaves as though the $899 has already been lost. Then Choice A represents an opportunity to bet $11 on the 10% chance of winning $1,000. This is like Situation III, where the average person would bet $1.10 (by giving up Choice B) on the 1% chance of winning $1,000.

201. This is most obviously the case in Situation IV. I would argue that Situation I can be seen as similar to Situation IV by considering that the chooser (here, the average person) has already won $1,000. The question then is whether the chooser wishes to pay $101 to avoid a 10% risk of losing $1,000. This is similar to Situation IV, where the average person would pay $1.10 to avoid a 1% chance of losing $1,000.

202. *See supra* notes 111–12 and accompanying text.

negotiation, or this element of all negotiations, that deception becomes an attractive tactic for individual negotiators.[203] Therefore, let us take one last weary look at the sale of the 1975 Buick, where hard bargaining characteristics predominate.[204] The price marked is $5,999. Jim is willing to pay up to $5,500 and Olivia is willing to take as little as $4,500. Both are circumspect about their respective willingnesses.

Suppose, after some haggling, Olivia comes down to $5,100 with some sort of statement designed to suggest that she is not willing to concede further. Jim has carefully observed Olivia during the negotiation and concludes that Olivia will probably come down to something under $5,000 if he pushes very hard. He pushes, saying things like, "I really don't think the car is worth more than $4,800," and "I really can't pay that much." She holds the line at $5,100. Jim considers using the ultimate hard-bargaining tactic—threatening to break off the negotiation.

In this context he would do so by saying "Well, I guess I'll have to look elsewhere," turning on his heel, and walking off the lot. This is an ultimate tactic because, for a number of reasons, he feels that if the tactic fails, he has lost his chance to accept Olivia's last offer of $5,100, despite the fact that her last offer is less than the amount he was originally willing to pay. To do so would involve a loss of face.[205] It also gains its status as an ultimate tactic because of the extreme pressure it creates for Olivia to come down. If Olivia is willing to come down but had hoped that Jim would come up to $5,100, her hopes are diminished when Jim walks away. She must either come down immediately or lose the sale. She would not know whether Jim was willing to pay $5,100 when he first approached her, but even if he had been willing, she knows his current behavior makes it difficult for him to accept that price now.

So Jim must decide whether to employ the tactic. He thinks that she would probably call him back as he walked away, and reduce her price to something under $5,000, say $4,999. He is not certain, however. He feels that there is a slim chance that she will let him walk off the lot. The car is worth $5,500 to Jim. That is what he was willing to pay when he began the negotiation. If he gets the car for $5,100, then it is as if he has won $400. It is Jim's sense that if he begins walking off the lot, Olivia will cave in and sell the car for $4,999, netting Jim another $101. He has some fear that she may not cave in, in which case he will have lost the deal, worth $400 to him.

The decision Jim faces is like Situation I above. His willingness to accept the risk of losing the $400 deal for a chance at winning $501 is affected by who Jim is. If he is an individual like the "average middle-class person" described in connection with the four situations above, then Jim is slightly less willing to take the risk than he would be if he were buying cars on behalf of a "large business."

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203. *See supra* notes 117–19, 136, 147–49 and accompanying text.

204. *See supra* notes 114–19 and accompanying text.

205. This example is, of course, simpler than a real negotiation for a used car is likely to be. One could imagine all sorts of ways the parties could overcome Jim's potential loss of face at being caught in a bluff. For example, Olivia could throw in a free oil change or a new spare tire. The point here is that the use of threat to break off a negotiation makes it more difficult for Jim to accept a price that he was originally willing to pay. It creates the possibility that there will be no sale despite the fact that there is a bargaining range.

It is not likely that Jim would quantify his sense of Olivia's position with the precision used in the above situations, but doing so here may help clarify my point. Let us say that Jim feels there is an 80% chance that Olivia will respond to his tactic by reducing her price to $4,999 and a 20% chance that she will allow the negotiation to end. According to my discussion of Situation I above, Jim will not use the tactic if he is an "average middle-class person" and he will if he is a "large business."

The fact that Jim cannot count on other similar negotiations to make up for the large loss he could possibly suffer here (a failure to win the $400 if Olivia sticks with her last offer) contributes to his reluctance to use the tactic if he is an "average person." If he is a "large business," then the risk seems less onerous because there will be other times where the tactic will work, and in the long run, use of the tactic will be more profitable than accepting the latest offer under the conditions set out in this version of the Buick example.[206] This suggests that, because of their aversion to this sort of risk, "average middle-class people," taken as a group, will not do as well as "large businesses." The "personal" Jims of the world will not, on average, come away with as big a piece of the pie as the "large business" Jims will under circumstances like those described in the sale of the 1975 Buick.[207]

As I have said earlier, I think the car sale is like Situations I and IV. Thus, there is some reason to suspect that the uncertainty created by the use of deception in these sorts of negotiations favors (in absolute material terms) the negotiator who encounters many similar negotiations. I have named this sort of negotiator the "large business" in the foregoing discussion. For similar reasons, the "large business" will do better on average than the "average person" in Situations II and III. Whereas the "large business" would consider the "average person" to be irrationally cautious in Situations I and IV, it would consider the "average person's" strategy in Situations II and III to be irrationally daring.

In short, lying and other forms of deception are useful to individual negotiators in their quests for a larger share of the pie. Deception does not help them create a larger pie. Negotiators use deception in negotiations that obviously contain pie-enlarging possibilities because they are concerned with the share of the pie, whatever its size, that they will receive. They are concerned that disclosures aimed at enlarging the pie will be used by the other side to claim a larger share.[208] I have argued in this section that the use of deception creates uncertainty as to whether a deal can be struck at all and I have wondered whether this sort of uncertainty might, on average, lead to the material aggrandizement of negotiators who participate in large numbers of similar negotiations.[209]

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206. Given my supposition that the tactic has an 80% chance of success, we know that there will be four successful uses of tactic for each time it fails.

207. This has nothing at all to do with the more obvious point that "personal" Jims will not be able to hire lawyers as skilled as the lawyers "big business" Jims will hire. This effect would work to the material benefit of the "big business" Jims, assuming lawyers skilled in negotiation charge more for their services than do less skilled lawyers. Given the fact that lawyers spend a large part of their time negotiating, this assumption does not seem outrageous. For more on this point, see *infra* notes 210–13 and accompanying text.

208. *See supra* notes 147–49 and accompanying text.

209. I am speaking here of the ability of the client to insure itself against risk. I am not speaking of mere experience. Although the experienced labor lawyer may be good at labor negotiations, he or she does not have the advantage that I

C. *The Social Impact of Distinguishing Between Lies and Other Forms of Deception*

If, as I have argued, the distinction between lies and other forms of deception is irrelevant to the evaluation of negotiations, what is the effect of making the distinction? It seems to me that the distinction makes negotiation something that rewards skill. If the rules of negotiation permitted all forms of deception, then it would be easier to learn to do it well. One would simply have to learn to keep a straight face.[210] Similarly, if the rules of negotiation required full disclosure and forbade all deception,[211] then negotiation would require less cleverness. It seems to me that there is a wide spectrum of ability among negotiators under rules that outlaw lying while permitting other deceptions. The difference between the very best negotiators and the very worst is larger than it would be if we did not make the distinction between varieties of deception. We marvel at Frances' cleverness at deceiving Thelma the way she did.[212] We feel no such admiration for Thelma, who deceived Frances by the use of lies. Our feelings toward Thelma are not completely explained by the fact that we find her tactics to be unethical. Her use of lies evidences no special skill. We feel that any of us could have duped Frances the way Thelma did, but we have some doubt about whether we could have come up with the clever scheme that Frances employed to fool Thelma.

Rules that allow for a variety of skill levels among practitioners lead to the emergence of specialists. One reason doctors and lawyers are elite groups of a sort[213] is that there is such a difference between the work done by a good doctor or lawyer and an incompetent doctor or lawyer. There are, of course, other reasons for the status of these groups. My aim here is simply to suggest that the distinction between lying and other deceptions supports the elite status of lawyers.

Another, more mundane, consequence of the skill requirement introduced by the distinction among forms of deception is the fact that, generally speaking, better lawyers will represent people who can afford to pay them more. It suggests that wealth and power will not flow from the rich and powerful to the poor and impotent as easily as it might under a set of rules governing negotiation that does not distinguish among forms of deception. Whether this is an argument for or against the rules depends on one's politics.

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am describing here. The large union dealing with numerous small businesses in isolated negotiations would have such an advantage. So would a large management group dealing with numerous labor units. A large department store would have this advantage in dealing with its complaining customers.

210. *See* P. EKMAN, TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS, AND MARRIAGE (1985).

211. It is not immediately clear how such a rule might be enforced, but enforcement is another issue. Here I am concerned only with the level of skill required to negotiate under a system where negotiators could be counted on to be truthful.

212. *See supra* notes 47–48 and accompanying text.

213. The fact that both groups are held in contempt by many is not evidence against their elite status. Being held in contempt is part of being elite.

VI. Conclusion

In the foregoing, I have argued that the negotiating convention that permits all deceptions but lying is both inefficient and a matter over which society (meaning, I suppose, at least all negotiating Americans) has a great deal of control—more than the scientific notions of truth would allow us to believe. I have suggested that the inefficiencies would be largely eliminated if we negotiated using a convention that forbade all deception. Stated positively, the convention would require a party to disclose all facts known to that party and known to be important to the other party. Lastly, I have suggested that there are two factors in the way of establishing such a convention. First, the fact that it is very difficult for one negotiator to know whether the other has used deception makes it difficult for the convention to be introduced in a piecemeal fashion. Second, the permission of some, but not all, deceptive tactics supports the wealthy versus the less wealthy by creating uncertainties that favor the risk-tolerant and by increasing the payoff for skillful negotiation.